United States Court of Appeals for the Second Circuit

JOINT APPENDIX

76-7178

UNITED STATES COURT OF APPEALS
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-7178

FRANKLIN SAVINGS BANK OF NEW YORK,
Plaintiff-Appellee,

—against—

GUSTAVE L. LEVY, *et al.*,
Defendants-Appellants.

JOINT APPENDIX

VOLUME II

Pages 608a-1300a

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FRANKLIN SAVINGS BANK OF NEW YORK

v. 71 Civ. 882

GUSTAVE L. LEVY, et al.

June 6, 1975

(Trial resumed.)

MR. PIEL: If your Honor please, I had intended to present those motions which were appropriately presented at the close of the plaintiff's case, but I understand that we have a deadline of 4:00 o'clock today for other engagements of your Honor, a calendar call that your Honor is conducting, and in the interest of getting the next witness on and completed today, with your Honor's permission, I will defer the --

THE COURT: I know you want to make a record, and you are entitled to make a record. Decision is reserved on all your motions, but I think you ought to make the record whenever you want to make it. We are in the defendants' case already.

MR. PIEL: We are very serious about our motions and want to present them seriously, but we appreciate that since so much evidence has been, if you will pardon the crude expression, dumped into the lap of the Court in depositions that your Honor couldn't possibly have read yet and voluminous documents, I realize that you would have to reserve at least on the substantive motion that the plaintiff has failed to make a case.

THE COURT: I take your motions seriously and my ruling is a serious one.

MR. PIEL: We press very seriously our motion to dismiss for want of jurisdiction, under the Securities Act, on the ground that we do not have a case here of an offer or a sale by means of an instrumentality in interstate commerce. Since we rely on your decision in the DeSapio case as one of our authorities, I need not explain that --

THE COURT: These things always come back and plague you, Mr. Piel.

MR. PIEL: I think your Honor is on the right track, a sound track, and it applies here.

THE COURT: Unfortunately, when they finally took DeSapio up at the end, they never raised the question. I suppose it didn't make any difference, because there were so many counts in the indictment. I didn't try the case, you know. Judge Tyler tried the case. I had the preliminary motions, when we had the old system of the master calendar.

MR. PIEL: Judge Brieant followed that ruling of your Honor in the Welch case and went off the deep end by ignoring the real documentary evidence, and on a record that is different from this one. So we would like to go into that at the appropriate time.

Secondly, we assert to your Honor that the Court lacks jurisdiction under the 1934 Act because what was sold here was commercial paper, which is exempt from those provisions of the 1934 Act.

Again, Judge Brieant in the Welch case misread the intention of Judge Friendly in the Zeller case, where, as I remember it, the instrument in question was a promissory note that a corporate officer made to another corporation. This is a situation in which Judge Brieant overlooked the fact that the test of what is whether it is commercial paper or not, exempt from the provisions of the 1934 Act, according to Judge Friendly, should go cognate with the question of what is commercial paper exempt from registration under the 1933 Act, and that's a question within the competence of the Securities and Exchange Commission, which has made it abundantly clear that the test which it applies in giving no action letters to issues of commercial paper of public utilities clearly applies in this case.

Finally, your Honor, or, really, in logical order it would have come first, we have motions to strike certain documents which were received subject to connection. Mr. Maney calls to my attention that we have another claim here which is under Section 17A of the 1933 Act, and there we assert respectfully that there is no private right of action under that section of the 1933 Act, and Judge Brieant so held in the Welch case. Your Honor received certain exhibits subject to connection, and we move to strike them now on the ground that connection was not made.

THE COURT: One of them is dependent on a witness whom you are going to call.

MR. PIEL: That is true only in one case, and that is the Lepley document, and we are not moving to strike that one because Mr. Stitt has not had his chance at Mr. Lepley yet to establish that document.

What I refer to are other documents.

THE COURT: Which ones?

MR. PIEL: Namely, Plaintiff's Exhibit F52 --

THE COURT: I have a note here, subject to connection and subject to the master computer.

MR. PIEL: On F32?

THE COURT: 52.

MR. PIEL: I misspoke. It is F32.

THE COURT: That's in.

MR. PIEL: It was received, as I understood, subject to connection.

THE COURT: On Bock's testimony it was admitted.

MR. PIEL: Your Honor, that will go to the weight and credibility of Mr. Bock's testimony, so I won't make that the subject of a motion to strike.

THE COURT: But it actually was admitted, I can't give you the exact time, but my "ID" is stricken off.

MR. PIEL: I was mistaken in my thinking for the moment until your Honor straightened me out that it was admitted subject to connection.

THE COURT: In Mr. Bock's testimony.

MR. PIEL: Through Mr. Bock's testimony Mr. Stitt purportedly connected it, so there is an issue there which we say he didn't satisfactorily establish, but that's for your Honor as a matter of credibility and weight.

F31 --

THE COURT: That's not in evidence. That is still marked for identification.

MR. STITT: I never got that one in, your Honor.

THE COURT: That's right.

MR. PIEL: I withdraw that comment, your Honor.

The following exhibits were received, according to my notes, in which I haven't got complete confidence, but I think this is right now, subject to connection:

Plaintiff's Exhibits F72 --

THE COURT: Let me help you out. The earliest one subject to connection is F52.

MR. STITT: Is that subject to connection or subject to correction, your Honor? I believe that was the understanding.

THE COURT: My handwriting is about the worst in the world, so it could be correction or connection.

MR. STITT: I dispute that, your Honor. I claim to have the worst handwriting.

MR. PIEL: Your Honor, I agree with Mr. Stitt.

THE COURT: It is correction?

MR. PIEL: It should be subject to correction by reference to the master computer run, Exhibit CU.

THE COURT: Does that mean my note as to F63 is subject to correction?

MR. PIEL: The same.

THE COURT: What about F54, is that connection or correction?

MR. PIEL: That again is subject to correction by reference to the same master computer run, Exhibit CU.

THE COURT: And limited to March 17, 1970.

MR. PIEL: Right.

The following were also received subject to connection:

F72 and F73 and F76, 77, and 78.

MR. STITT: I don't believe that was true of F76, 77, and 78, your Honor.

THE COURT: 76, 77, and 78 were held pending somebody's testimony. I don't know whose testimony that was supposed to be.

MR. STITT: That would be Mr. Asay's testimony, your Honor.

THE COURT: 79 is held for Lepley's testimony.

MR. PIEL: That's right. I am not raising a question about 79, but Mr. Asay has come and gone, and although he authenticated these documents and said they were in a file in his custody, he did not establish the predicate on which your Honor was receiving them subject to connection, which is that Mr. Stitt was going to produce a witness that would show that this kind of a confidential internal document constantly revising earnings estimates for the purpose of managerial or bord decisions is the kind of a document that conceivably somebody on the outside, with the exercise of reasonable care, could be expected to have seen.

I think, your Honor, that the statute that we deal with here, one of them, assuming that there is jurisdiction, does say with reference to the fact allegedly misstated or the fact allegedly omitted and necessary to make a statement made not misleading, that if proof of such a statement is made, and it hasn't been here, but making that assumption, that the defendant has to sustain the burden of proof that he did not know and in the exercise of reasonable care could not have known of such untruth or omission.

All of the cases that have held against the defendant on the theory of in the exercise of reasonable care could not have known, have dealt with typical kinds of situations where if somebody had asked obviously would have been told. It would have been feasible.

We are dealing here with something of which I think the Court can take judicial notice in this district where there is so much business and financial litigation, that there are types of business planning documents that as a matter of course are not available to people outside the corporation. To open the floodgates in this Court of a ruling that any time there is something of a confidential nature, obviously, of a confidential business nature inside a corporation, that someone sued under 12-2 of the Securities Act has to prove affirmatively a negative that he couldn't have got that, it is going to invite a ridiculous, unrealistic flood of claims. That can't be the intention of the statute, and I say we have no burden of going forward on that point when his proof of the fact that he said it was not disclosed is on its face a confidential, from the corporation's point of view, non-disclosable fact.

It is just the kind of a thing that they would have to make a deliberate decision to release and release very carefully to the public so as not to create an insider problem. That has particular reference to 76, 77, and 78.

THE COURT: Mr. Stitt?

MR. STITT: Two points, your Honor, if I may. First, these documents were authenticated by Mr. Asay following my original offer, my initial offer, as business records in testimony that the Courr recalled was sufficient to authenticate them, and they were received.

Second, it is Mr. Piel's burden, as I believe he finally recognized in his statement, that the defendants have the burden of showing under Section 12-2 of the 1935 Act that they could not have learned of this information in the exercise of reasonable care.

The record has abundant proof, I believe, that they could have well have obtained this information, and I don't think the defendants can possibly meet this, and just as an example, I would call attention to the following testimony of Mr. Wilson. It is designated from his Welch testimony at Page 1910. This has to do with the February 10th meeting where there were discussions about a $56,000,000 overall loss for 1970.

THE COURT: Wait a minute. I can't rule on your motion at this point, Mr. Piel, until I have read the deposition testimony of Mr. Levy, Mr. Wilson and the rest of them, but I will note here --

MR. PIEL: On this point, your Honor, it did not come in in plaintiff's case, but the only thing in the record that pertains to the discoverability of those documents is in the deposition of Mr. Bevan which we submitted to your Honor yesterday, where you said that portions designated by us --

MR. STITT: Page, please?

MR. PIEL: 143, this is a question by plaintiff's counsel to Mr. Bevan in pretrial discovery -- may I just read it to your Honor?

THE COURT: If you wish to.

MR. PIEL: "Question: Did you at any time during the course of your relationship with Goldman, Sachs in 1968, 1969, or 1970, ever give information to Goldman, Sachs about earnings of Penn Central prior to the release of that information to the public?"

After a colloquy, the answer was:

"I don't think -- as far as I recall, I never gave any information to anybody in the way of earnings before it was released to the public."

Then at Page 169, plaintiff's counsel marked documents including --

THE COURT: You see, you are arguing from the testimony that came in on your case.

MR. PIEL: That's right, your Honor.

THE COURT: Why don't we hold these in abeyance, and I will review them again?

MR. PIEL: May I then just mention to your Honor --

THE COURT: You are referring to Exhibit 72, Exhibit 73, Exhibits 76, 77, and 78?

MR. PIEL: Yes. May I also at the same time, without reading it to your Honor, as long as your Honor is making a note about it, refer also to Pages 169 to 171 of Mr. Bevan's deposition in which he was questioned about those documents in terms of their availability to others? Those are our motions, your Honor.

MR. STITT: Your Honor, so the record may be completely clear, I would simply draw attention to Exhibit Fd, the meeting of February 6th, at which Mr. Bevan and his associates did just that, they did disclose information to Goldman, Sachs concerning their projections at that time for the entire year 1970. That was not public information. Furthermore, in my designations from Mr. Bevan's testimony, I am going to draw your Honor's attention to Pages 143 and 144, and I think his testimony there in original form and also as corrected, will be of interest to the Court on this point.

THE COURT: Let's proceed with the witness, the next witness.

MR. PIEL: If your Honor please, the defendant calls J. A. Vogel, and with the Court's permission, Mr. Maney will conduct this examination.

THE COURT: All right.

JACK A. VOGEL, called as a witness on behalf of defendants, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. MANEY:

Q Mr. Vogel, are you employed by Goldman, Sachs & CO.?

A Yes, I am.

Q What is your position there?

A I am vice-president in charge of the credit department.

Q How long have you had that title?

A Approximately three years.

Q Would you please briefly give us your professional and educational background?

A Graduated from Rider College in Trenton with a Bachelor of Science in commerce. Actually it was a major in journalism with a minor in business. I was employed by the Grace National Bank of New York for approximately ten years. The latter part of that I was the assistant cashier in charge of the domestic division of the credit department, also alternate secretary to the discount committee of the bank, which passes on all loans of the bank or passed on all loans.

Subsequently, I joined Goldman, Sachs, and I have been there ever since, approximately 13 going on 14 years.

Q Will you explain what your duties were at Grace National Bank?

A Yes. I headed the credit department, and the people under me were responsible for analyzing the financial statements, and what-have-you, of our -- of all of the borrowing accounts of the bank. Among other things, it also conducted credit investigations with, for example, other banks that had lending relationships with that particular account. It discussed their relationships, how they felt about them, and so forth. Also we presented analyses which were used as a basis of deciding whether or not the bank was interested in making a loan to a particular borrowing customer.

Q Would you please explain what position you had at Goldman, Sachs when you started there?

A Initially I was -- the title was credit manager in charge of the credit department.

Q What year was that?

A That was in 1962, I would say.

Q For the period 1962 through 1970, did your duties change?

A Essentially, no. It expanded.

Q Are you a member of any professional organization?

A Yes, I am. I am a member of the Robert Morris Associates -- I don't know whether you are familiar with that, your Honor, but it is an association of loan and credit officers of banks throughout the city. There is a chapter here in New York. At the present time I am the public relations director for that particular organization. It is one made up of people who have policy-making -- who are at the policy-making level in either credit or loans.

Q Mr. Vogel, unless I indicate otherwise, all the questions will deal with the period 1969-1970 -- 1968, 1969, and early 1970. Could you describe the organization of the credit department?

Q During that period?

Q During that period.

A We had approximately four or five people physically in the credit department. Walter Fekula, who was the more senior of that group, was the day-by-day sort of supervisor of these other group of anlysists.

Then we had Chuck O'Donnell or Charlie O'Donnell, who was one of the analysts, Mike Evans was another analyst, Bob Hoffman was an analyst.

There were others in that period. I remember Olive Tully. There were others in that period. These come to mind.

THE COURT: You used the term "analyst." What does the term "analyst" mean?

THE WITNESS: These were people whose job it was to follow on a day-by-day basis the various materials that we got from numerous sources. To the extent that that material needed to be examined in relation to all other material they had seen, they would make that examination.

To the extent they felt I should know about that particular document that particular day, they would send it to me.

THE COURT: Regarding what?

THE WITNESS: Let's assume, for example, a quarterly earnings report came in on a particular company that they are assigned to follow on a day-by-day basis. They would examine that earnings report and say, well, there is sufficient interest here for me, Jack Vogel, to want to read it and do whatever I felt was necessary beyond just reading it. They would send the file and/or the report, call me on the telephone and tell me about it.

THE COURT: These were necessary for credit determinations?

THE WITNESS: As far as I am concerned, your Honor, all material that comes into the credit department or into Goldman, Sachs relating to one of our particular issuers is something that I have interest in.

In addition to the day-by-day, annually we would have them write what we term an annual credit review, which was essentially a trend analysis type of review, stating that the company's debt to equity, for example, is going up or down.

THE COURT: You were not limited solely to commercial paper, were you?

THE WITNESS: Yes, I was.

THE COURT: I didn't understand that.

Q Is that true of the entire credit department?

A Yes. Our whole function was for commercial paper. We had no other function for the firm.

Q Is there another department of the firm that analyzes companies other than for commercial paper?

A I am certain there is. Each department would have a specific application, whether it be stock underwriting or bonds or what-have-you.

THE COURT: All right. It is clear enough.

Q How was an analyst assigned to a particular company during that period?

A There was essentially an alphabetical breakdown. Each analyst was given a group of letters to deal with. Anything that came in within the context of that group of letters, he would be the person that would write the analysis that I mentioned, the annual review, and follow it on a day-by-day basis.

Q How did the information to be reviewed come to the analyst's attention?

A We had numerous sources. In addition to the -- are you talking about on a continuing basis now?

Q Yes.

A Every day, for example, all of the relative financial material, earnings reports, stockholders releases, annual reports, items of that nature, would come into the library and a list would be typed up indicating that which came in. Thatlist, together with this whole passel of reports and things would go into the credit department. Walter Fekula, for example. Walter would review that list, pick out those pieces of material that belonged to the credit department or they were commercial paper issuers, relating to commercial paper issuers.

Then he would then distribute that particular item to whoever the anlyst was charged with the responsibility of following that name.

In addition to that he read -- of course every day -- at one time we had four newspapers. It was the New York Times and the Wall Street Journal. We used to have the Journal of Commerce, for example, and there was one other. I can't remember what it was. Each the newspapers would be reviewed within the context of the credit department to cut out any article that would relate either in a direct way or in a general way, we are talking about railroads here today, but if there was an article about railroads, we would cut the article about railroads out of the paper. That would be reviewed every day by me. It was put in a booklet form and if I had not seen it reading my own newspaper, I would get the booklet daily and review the clippings as done by the credit department. Of course, we had all of the statistical manuals, Moody's, for example, in connection with railroads.

In addition to their annual manual which came out once a year in the latter part of the year, they would have twice a week updates published of the annual manual which we would review from time to time in terms of how it applied to our commercial issuers.

We would get directly from the company various materials including annual reports and stockholders releases. We always asked for releases from banks and credit lines. We would get whatever legal documentation that was required on a continuing basis for any particular issuer, such as, if they had to make application to some regulatory body in order to be able to issue a commercial paper, we would get the application together with the approval of that body. Those would be reviewed.

On an annual basis and sometimes even more frequently we would check with other lenders, banks, primarily, to get their particular impressions of the company and its management and what their experience had been in lending, and a confirmation of their line relationships.

THE COURT: I think that is enough.

Q Mr. Vogel, are you speaking of following issuers on a continuing basis?

A Yes, sir.

Q How did you assemble the data with respect to a potential issuer who had not yet been -- started selling paper to Goldman, Sachs?

A We had several basic sources. One was the statistical manuals that I have indicated. There was the Transportation Manual. Moody's Investor Service puts this manual out --

Q They put out other manuals besides --

A Yes, they put out industrials, one relating to banks, insurance companies, and so forth. That is for historical data, it is a great source of historical data, both on the company and any prior companies. It also provides usually on a major company like the Penn Central was, long histories of trend analyses, statements filed back for ten, twelve years, and so forth.

Q Is Moody's a source that is generally used by you in your work?

A Invariably, yes.

Q To your knowledge, is Moody's Service used by credit analysts and loan officers generally?

A I would think they would be remiss if they didn't. It seems to me that every bank that I know of has that service.

Q To your knowledge, is Moody's Service relied upon by persons in your occupation, credit analysis?

A Oh, yes, sir.

In addition to Moody's, our library maintains files on public companies or the New York Stock Exchange, and what-have-you. I don't know how many hundreds and hundreds of files they have. Maybe they are in the thousands. They are a catch-all for -- these files are a catch-all for every public document that the library received over a period of many, many years. That includes many things. All sorts of stockholders releases that I mentioned.

In addition to that they would have prospectuses on dead issues, they would have, if there were reports written either by our research department or somebody else's, they would be in the file. They had their own clipping service, still do, which they would cut articles relating to that particular company they were following with that file. That file we would use in any initial approach to a brand-new issuer in making a credit evaluation.

Q This is called the library file?

A Yes, the library file.

Q Where does all this material go after it has been clipped and read?

A After it has all been compiled, that which relates directly to the commercial paper aspect of it, it is put in what we term to be an active credit file and maintained in the -- at that time it was in the -- right alongside the credit department, there was a bank of files, and these files were kept in that bank of files with two people who were assigned to file cards who were assigned the direct responsibility of everyday maintenance of the file cards, keeping them in the drawer and filing them out, etcetera.

Q I show you Defendants' Exhibit A for identification and ask you if you can tell me what that document is?

A This is the credit file for Penn Central Company.

Q Was there another file for Penn Central Company besides the credit file, Exhibit A for identification?

A Yes, we had, as we do on all issuers, what we term a loan agreement file, which is another file containing agreements covering -- contractual agreements covering long-term debt or even short-term debt in case of revolving credit, a kind of bank accommodation, and then we had a documents file, which are these documents I mentioned earlier, authority to file.

If it were an application to a regulatory body, that application and the approval would be put into the documents file. There were three files. I might even add, there was a fourth file which we termed to be an excess file, which sometimes we got two or three copies of something and we put that in the excess file.

THE COURT: When do you destroy them?

THE WITNESS: Your Honor, we have a paper problem.

THE COURT: The rent just for the excess files must be tremendous.

THE WITNESS: We do have a warehouse schedule, as we call it, so it all isn't piling up over 20 years.

Q Where was the credit department physically located in 1968, 1969, and 1970?

A Right adjacent to this bank of files, right adjacent to the library and just adjacent to the file cabinets containing the credit files.

Q Was the library located on the sixth floor at 55 Broad Street?

A That's right.

Q Right next to the library was the credit department, part of the library?

A The credit file section of the libary.

Q Right next to the credit file section was the credit department?

A That's right. The whole purpose for it to be there was because it had all that information at is fingertips and could reach out and get it.

Q Was every member of the credit department located on the sixth floor next to the credit files?

A Everyone but myself.

Q Where were you?

A I was down on the fifth floor, next to Wilson's office.

Q Directly below the credit department?

A Not directly below, but one floor.

Q One flight?

A Yes.

Q Could you briefly explain to the Court the physical layout of the fifth floor where you worked in 1968, 1969, and 1970?

THE COURT: I really don' think that makes much difference, Mr. Maney. It is more important to know what was said and done.

Q What was the function, if any, of a credit analyst with respect to a potential issuer not yet taken on in 1968, 1969, and 1970?

A On all potential issuers, the preliminary work I did. That varied in terms of cases. There were some that would take about two minutes to look at a statement and generally observe that it is within our framework of acceptable as a commercial paper isuser. To the extent it was one of those, I'd send it up to whoever the analyst was and ask him to develop these files that we mentioned, the credit files, and so forth; all the background material that I have mentioned.

He would also draft -- at the time we were putting out what we called a yellow sheet, which was, for lack of a better description, just a mini sort of summary of the history of the business, when it was established, and a balance sheet summarized financial, three years of operating financial, and then a list of banks, bank references, which if an investor chose, he could check with to find out what the banks felt about that company. He would prepare that yellow sheet. He would tell me if there were any, for example, documents, legal documents, missing. We hadn't got the borrowing resolution or we hadn't got this, and so forth.

Then if he felt he wanted to analyze it from a credit point of view in terms of a written analysis and send it down to me and say this was his impression of that company.

Essentially, that was their function at that time.

Q Was there a credit analyst assigned to the initial investigation of Penn Central?

A I am certain there was.

Q Do you know who that was?

A I just have no recollection.

Q Do you recall what work, if any, was done by the analyst in connection with the initial investigation of Penn Central?

A I suspect very little, because Penn Central was a relatively unique type of credit. In that respect, I know I did 95 percent of all of the work on that credit in terms of credit analysis, and so forth.

Q What do you mean by a unique type of credit?

A Every credit has its unique characteristics. Penn Central was a very unique one. First of all, it was a very recent merger of two very old and very large railroads which went through years of examination by everybody, the courts included, in terms of whether they should be put together or not put together. It was a tremendously large -- I think it was the largest transportation company in the world at that time, involving numerous states and 20-some odd thousand miles of track, if I remember. It had enormous asset structures, almost $6,000,000,000 of assets, both railroad type of properties and non-reailroad. It had great real estate properties. No other railroad over a period of years had ever made a heck of a lot of money out of their pure, quote, railroad operations.

Basically it was the non-railroad operations that were making the money in those years that they showed profits. So if you viewed it from a sort of consolidated point of view, although on the one hand the railroad operation wasn't making a great deal of money, they were making a substantial amount of money in some of their non-railroad activities. To the extent that this was unique, initially we were looking at it from the point of view of there was enormous amounts of assets here, and the amount of commercial paper that was going to be issued, assuming that we agreed to handle it, was relatively minor in relation to these assets.

At that time I think everybody and his brother was suggesting that the merger was going to be an extremely beneficial one for the two railroads -- for the rail opeations, because of the economies that would be effected, and what-have-you. So it was unique in the sense that it didn't have a proven track record of good and substantial earnings within the railroad, which is what everybody knew it as.

It did have a tremendous profit potential in both the railroad in the future and in the non-railroad activities. I just felt that an analyst without years of experience, pardon the expression, which I had, wouldn't be able to cope with all these.

Q Mr. Vogel, what is the function of the credit department?

A The function of the credit department on a day-by-day basis was to compile data, put them in the credit file, annually make a written review of this data, primarily trend analysis. This company's operating earnings were going down, this company's debt ratios were going up or down, this company's -- that sort of analysis, and then either send it to me or discuss it with me.

Q What was the purpose of the whole credit department, including you?

A The purpose of the credit department was to decide whether we felt that we, Goldman, Sachs, felt that our potential or existing commercial paper issuer was a credit-worthy company and whether or not we should buy those notes.

Q What do you mean by the phrase or word "credit-worthy"?

A "Credit-worthy" means to me that there is no question that the notes that we are buying will be paid when due.

Q Why does Goldman, Sachs perform that function, if you know?

A Why?

Q Why?

A Goldman, Sachs performs that function because when we buy that note, it is ours, and until we sell it we are running a credit risk, if you will. It is our note, and we don't want to -- I certainly don't want to be a party to the firm buying a note that in any way, shape, or form is not going to be paid.

Q Was a credit review performed only with respect to Goldman, Sach's purchase of notes?

A That's the sole reason for the review. Clearly there are other advantages growing out of that. Obviously, if we have concluded that the note is a good note and will be paid, then we will in turn, assuming there is not a marketing reason why we can't sell it, we will in turn sell it and whoever buys the note accrues the benefit of our judgment in that matter.

Q What would you do if after reviewing the data you concluded there is some question about the creditworthiness of an issuer?

A Under those circumstances, I would immediately go to -- Bob Wilson was the partner in charge of the commercial paper department. I would immediately go to Bob Wilson, and assuming we had notes in inventory, we would stop selling those notes. Conversely, we would also stop buying them.

Q You would stop selling the notes in inventory?

A Oh, yes.

Q Why?

A Why?

Q Yes.

A If I had the slightest doubt and Bob Wilson had the slightest doubt that a note was going to be paid at maturity, we would not sell that. It would not be a note sold.

Q I am asking you why?

A I think among other things it would be one of the most immoral acts, let alone the legality, be involved in.

Q Did you ever determine that you did not have any question about the credit-worthiness of an issuer based on facts that you recognized might lead another analyst to have doubt?

A I am sure that if you put 20 analysts in a room, I don't mean to -- 19 out of 20 would say yes and maybe one would say no, but I think most would agree with whatever judgment that I held on that particular piece of information.

Q Did you, during the period '68 and '69, participate in the initial credit investigation of every potential issuer coming to Goldman, Sachs?

THE COURT: I think that's been answered already. He certainly said that he spent 90 percent of his time on the Penn Central note, or 90 percent of the work done on Penn Central was done by him.

MR. MANEY: I am asking, your Honor, about every issuer.

THE COURT: What difference does it make?

THE WITNESS: Did you want me to respond to that question?

THE COURT: No, you don't have to.

Q When did you first become involved with Penn Central?

A We had been building a file on Penn Central or one of its constituent railroads for several years prior to the ultimate merger. As a matter of fact, we did handle briefly an issue of commercial paper for the New York Central Railroad just prior to the merger.

Q Mr. Vogel, in looking at Penn Central in the manner you described earlier, did you look at any brokerage reports?

MR. STITT: May we fix the time?

THE COURT: He indicated he became involved in Pennsylvania several years prior to the merger. You don't want to go back that far, do you?

Q Did you perform any function in connection with analyzing the Penn Central Company or Pennsylvania New York Central Transportation Company?

MR. STITT: Your Honor, may we fix the date of the merger?

MR. MANEY: It is stipulated it is February 1, 1968.

A Yes.

Q Do you recall when that work took place?

A A great deal of it had to do with the issuance of the New York Central Railroad just prior to the merger.

THE COURT: Let's get past the merger. We are dealing with Penn Central. When did you start working on Penn Central?

Q Did Penn Central, by whatever name then known, come to Goldman, Sachs to discuss the issuance of commercial paper?

A Yes.

Q Did you perform a credit review of Penn Central prior to the issuance of commercial paper by Penn Central?

A Yes, I did.

MR. STITT: May we fix a time, your Honor?

THE COURT: Let him get the words out of his mouth.

Q When did that take place?

A It was on a continuing basis from the time the idea was first broached to us, which is the latter part of 1967, as I recall it, right through to the day that we ultimately commenced handling --

THE COURT: You couldn't have done any research work on Penn Central until it was formed, could you?

Q Was the Penn Central merger a matter that had been awaiting consummation for court approval?

A A number of years, a number of years. Yes, sir, clearly we would have to do it -- there were railroads in connection with that merger, and an understanding of the background of those railroads was important to any evaluation of the combined railroad.

THE COURT: All right.

Q Do you recall when you completed your initial credit investigation of Penn Central?

A The initial one?

Q Yes.

A It was some time just prior to our -- we started selling the paper.

THE COURT: When would that be?

Q Do you remember when that was?

A It was in the summer of 1968.

MR. MANEY: I take it it is stipulated that it was August 1, 1968?

MR. STITT: I missed the point.

THE COURT: The summer of 1968, all right.

Q Prior to the completion of your initial credit investigation on Penn Central, did you read any brokerage reports about this new company, Penn Central?

A I don't recall specific brokerage reports, but I was aware of what the street was saying at the time.

Q I show you Exhibit D for identification and ask if you recall having seen that document prior to the completion of your initial credit investigation?

A I don't recall having seen it. Let me review it all.

Q I make particular reference to the pages dealing with Penn Central, Page 7.

MR. STITT: Your Honor, I believe the witness has testified that he doesn't recall having seen this document, so I would object to any further questions, but I do ask that it be identified for the record so we will know by date what instrument we are talking about.

THE COURT: He is referring to Exhibit D for identification which is dated July 26, 1968, which is a Goldman, Sachs internal memorandum, as I gather it.

MR. MANEY: I believe we can handle that with some other witness, your Honor.

THE WITNESS: Ithink portions of this memorandum were in the credit file, the one dealing with Penn Central. I am referring to the total memorandum. I did not see this particular total memorandum, which contains reports on several companies.

Q Did you read any blue sheets on Penn Central in connection with your initial credit investigation?

A All of them that were in existence.

Q I show you Exhibits A109 and A111 for identification. I ask you if you recall having seen these two exhibits?

A I am certain I did.

MR. MANEY: I offer them in evidence, your Honor.

THE COURT: Any objection?

MR. STITT: Your Honor, I just ask when the witness testifies that he has seen Exhibits 109 and 111?

Q Mr. Vogel, do you recall when you read these two blue sheets, Exhibits A109 and A111?

A I can't be specific about the date. It was some time prior to the -- to our commencing issuing commercial paper.

MR. MANEY: I offer them in evidence.

THE COURT: Any objection?

MR. STITT: Your Honor, on the testimony of this wintess, I wouldthink that they should be -- I can not really object to their being received.

THE COURT: All right.

(Defendants' Exhibits A109 and A111 were received in evidence.)

Q I believe you testified that in connection with your initial credit investigation, you consulted Moody's, is that correct?

A Yes.

Q Moody's is a fiscal service published annually and updated biweekly, is that correct?

A That's correct.

Q Which part of Moody's did you use in looking at Penn Central?

A That part relating to Penn Central as well as the parts relating to the railroads, the New York Central and the Pennsylvania Railroad, going into the make-up of Penn Central.

Q What was the name of that volume?

A It was Moody's annual memorandum, I believe the 1967 --

Q Was it the Transportation Manual?

A Transportation Manual, yes.

Q You say 1967?

A In connection with the initial investigation, yes, sir.

Q When did these annual volumes come out?

A It was in the fall of the year normally. September, '67 -- they are dated I think September and they run --

Q I show you Exhibit AM1 for identification and ask if you can identify that volume?

A Yes, this is Moody's Transportation Manual, it is the annual manual for 1967.

Q That was a volume used by you in connection with your initial credit investigation?

A Yes, sir.

Q And I believe you testified that Moody's Transportation Manual is a publication generally used and relied upon by persons in your profession?

A No question about it in my mind.

MR. MANEY: Your Honor, I offer Exhibit AM1 for identification in evidence, with the same statement that was made with reference to the computer run, namely, that only thoseportions which we specifically cited to the Court in the post-trial briefing woudl be applicable.

THE COURT: Any objection?

MR. STITT: Your Honor, I --

MR. MANEY: Subject to 803 Sub 17 of the Federal Rules of Evidence as a generally rleied upon service by persons in Mr. Vogel's profession.

THE COURT: Do you want to adjourn the trial to July 1?

MR.MANEY: No, your Honor.

MR. STITT: My objection would be on the grounds that this document was not produced on pretrial discovery. I don't believe relevance has been demonstrated, al on hearsay.

THE COURT: Overruled.

(Defendants' Exhibit AM-1 was received in evidence.)

Q I show you Exhibit A-139 for identification and ask if you can identify that document?

A Yes, sir. This is a copy of a 1967 annual report of Penn Central Company.

Q Penn Central came into existence in February, 1968.

Would you explain how you would have a 1967 annual report?

A Yes. These are pro forma figures based on the consolidation of the two railroads as of the year ended December 31, 1967. It is very common to have that done when an event of that magnitude occurs very shortly after a year's end.

Q In other words, this document pretends that the two companies had been together throughout 1967?

A As of the end of theyear, that's right.

Q Mr. Vogel, you have the credit file, Exhibit A for identification, in front of you. Is Exhibit A-139 for identification in that credit file?

A Yes, sir.

MR. MANEY: I offer Exhibit A-139 in evidence.

MR. STITT: No objection, your Honor.

(Defendants' Exhibit A-139 was received in evidence.)

MR. STITT: My sole objection, your Honor, I might have said, was relevance.

THE COURT: Objection overruled. My problem is do we need all of this huge stuff in? You are going to be able to break somebody's back carrying it around. What's the necessity for all of it, Mr. Maney?

MR. MANEY: Your Honor, I am afraid we had requested that a number of financial facts be stated as agreed in the pretrial order, and we were unable to get those concessions. I appreciate that part of it was the fact that we were moving so rapidly that counsel for plaintiff did not have or choose to use the time checking our sources, but our proposed findings of fact and conclusions of law, with particular reference to proposed findings 4 through 124, Pages 19 to 25 of our proposed findings of fact and conclusions of law, set forth certain basic financial data with respect to Penn Central and the component parts of Penn Central from the standpoint of the reasonableness of the credit judgment reached by Goldman Sachs & Co.

THE COURT: I am talking about this material way back in 1967 or '68. Is there any dispute that the public documentation, such as the witness has been referring to would justify the defendant in selling or not selling the commercial paper?

MR. MANEY: Your Honor, to look at, if I may just use one example, 1970 in evaluating some of the integral parts of the Penn Central system which did not have a public market for the securities, this witness' testimony would be that an evaluation was reached by using a three-year average of earnings and capitalizing it as investment bankers will do. For that reason we need the '67 figures. It is the defendants' position that from Mr. Bock's own testimony the question really was, did Goldman, Sachs make a credit judgment with respect to Penn Central, and I am trying to establish, your Honor, that that judgment was reasonable, and it is the defendants' position that the data reviewed by this witness and others amply establishes the reasonableness of the judgment reached in 1970 that Penn Central had the capacity to repay its debts as they matured.

THE COURT: Mr. Stitt?

MR. STITT: Your Honor, I simply rise to protest any implication in counsel's remarks that the plaintiff's counsel did not cooperate in pretrial proceedings --

THE COURT: Oh, come on. We are not wrried about that. Come on. We have been here for a week. I am trying to find out what the issue is.

MR. STITT: I agree with your Honor's thoughts that I don't see how these reports can be of any significance--

THE COURT: Do you challenge the good faith of Goldman, Sachs up to January 1, 1970 in selecting Penn Central for the sale of commercial paper?

MR. STITT: Yes, sir.

THE COURT: You do? Then all that has to come in, doesn't it? All right. Go ahead.

BY MR. MANEY:

Q Mr. Vogel, I call your attention to Exhibit A-1 for identification, you will find it in Exhibit A, and ask you if you can explain what that document, which I believe is four pages on both sides, is?

A Should I look for it here? It should be in the credit file.

THE COURT: This is a Peat, Marwick auditors' report?

Q What are these pages?

A These are what we -- comparative analysis form. They are what we term a spread sheet. They are intended to be used to post relative components of a balance sheet and an income statement on a year-by-year basis for trend analysis purposes.

These were in -- are a part of the Penn Central part.

THE COURT: I am sorry, you prepared this?

This is not a Peat, Marwick documents, is it?

THE WITNESS: That just indicated that the auditor was Peat, Marwick, yes.

Q These are spread sheets?

A Spread sheets. This is a typical thing that our analyst in the credit department would prepare.

Q Where is that located in the credit file,

Exhibit A for identification?

A It is right in the beginning of the credit file, the first section.

THE COURT: All right, it is in.

You are not putting the whole Exhibit A in evidence, I think you are just offering portions of Exhibit A?

MR. MANEY: I think eventually we will mark the whole of Exhibit A.

THE COURT: Then why do you want a separately marked document?

MR. MANEY: I will be happy not to mark it separately, but at the time we offer Exhibit A we will withdraw all A designated exhibits.

THE COURT: Defendants' Exhibit A-1 is in.

(Defendants' Exhibit A-1 was received in evidence.)

Q Mr. Vogel, did you conclude in 1968 that the Penn Central was credit-worthy?

A Yes, I did.

Q On what did you base that conclusion?

A Based on a review of --

THE COURT: What date?

Q When in 1968, Mr. Vogel?

A Some time in the middle of the summer. Just before we commenced handling the commercial paper of Penn Central. I can't be specific as to a date.

Q On what did you base that conclusion?

A Heavily based on what was then the credit file of Penn Central, what was included in the Penn Central credit file, a review of various other documents, including the application to the ICC for approval to issue the paper, and examination of the borrowing resolutions and all of the statistical manuals I have mentioned, and the review of the files in terms of whatever blue sheets were there at the time, and just a total review of these files that I mentioned.

Certainly there was more than ample what I -- for example, as I recall at that time, they just established $50,000,000 worth of credit lines, back-up credit lines, for the commercial paper issuance, which certainly was a strong indication to me in addition to the 100,000,000 of already existing credit lines which were being renegotiated at that time, that the bank lenders in this picture were quite content with the credit themselves. As a matter of fact, as an aside from bank lenders, as I remember, each and every time we got an approval from the ICC for these applications, there was in there, "It is in the public interest." So as far as I was concerned, the ICC, for example, is the regulatory body that examines all railroads, gets voluminous information from railroads, and if they concluded that this sort of thing is in the public interest, it was just reinforcing my own opinion that it was a credit-worthy company.

MR. STITT: I object to that answer as not being responsive, and self-serving.

THE COURT: How else can he tell you why he did it? He is telling you why he did it.

Objection overruled.

Q What assets were you looking at, Mr. Vogel?

MR. STITT: May we fix a time?

MR. MANEY: In 1968.

A We were looking at the consolidated picture as well as companies, for example, like Pennsylvania Company, which was a holding company for a lot of their non-railroad type assets, companies like Great Southwest and Arvida, and also they had a substantial block of Norfolk & Western Railroad stock, as well as stock interest in other assets. I can't offhand recall them all at this point. And we looked at all of these, or I did, I should say.

Q At all what?

A All of these companies in context with the original evaluation of credit-worthiness of Penn Central.

Q How did you value the companies?

A It depended on -- Penn Central as a consolidated company had -- Penn Central, the transportation company, had investments in, say, the Pennsylvania Company, for example, which they carried on the books, your Honor, at about $100,000,000, if I remember, which was clearly worth substantially in excess of 100,000,000 no matter how you evaluated it, which you took -- which I did in the case of securities which didn't have a public market. If you took just three years' earnings and multiply it like you would in a price-earnings situation, times ten, it was, you know, substantially in excess of the value that Penn Central had on its books for Pennsylvania Company. You follow that reasoning throughout the individual assets within the context of Pennsylvania Company, you got much the same type--

Q For companies that did not have a public market, how do you value them?

A To the extent that we did not have companies that had public markets but yet had track records of earnings that could be used as a basis for coming up with this ten times or capitalized earnings evaluation, we used earnings. I used "we." I am talking Jack Vogel at the moment, collectively. To the extent it had a public market of some kind, whether it was an over-the-counter security or a

New York Stock Exchange security, we would use the valuations ascribed to those shares on those exchanges.

Q Was that the value of the stock times the number of shares?

A Times the number of shares, right.

Q Were there any companies that did not have reported earnings and were also not publicly traded, their stock was not publicly traded?

A Yes. There were several companies that I personally looked at in terms of potential assets that had value. There were a number of companies the railroad owned in that respect.

Q How did you value those?

A Usually at the figure given -- I remember I got a number of them out of the proxy in connection with the formation of a new holding company, they had the list in there of principal railroad subsidiaries. They valued them at net assets. A couple of them we knew from our files who at one time -- one, at least, was a potential -- we discussed the possibility of having commercial paper for that particular issuer, so I had a background in their statements. That was the net assets -- in the case where there was no public markets or there was no -- either I couldn't get earnings out of one of these manuals I mentioned, or I would accept then in that case whatever management's estimate of their net assets were put in what I considered to be an important document.

Q After Goldman, Sachs started buying the paper of Penn Central in the summer of 1968, did you thereafter perform any credit review of Penn Central?

A Yes.

Q What was the nature of that review?

A On every issuer, we had, Mr. Maney, an ongoing review. As material would come in -- for example, the annual report as of the year ended 1968, as that came in there was a substantial write-up done by one of our analysts on that, and that I reviewed. From time to time as changes came to my attention in terms of some of the assets that I was looking at, I would make an evaluation at that point.

Q Before the initial sales of commercial paper of Penn Central were commenced by Goldman, Sachs, did you do anything else with respect to Penn Central other than the credit review? I believe you mentioned the yellow sheets.

A Yes. I didn't personally do the yellow sheet, but we prepared a yellow sheet which covered this little mini-history of the firm -- rather of Penn Central, and then it was our practice to cut an exact replica -- when I say "cut," I mean reproduce an exact replica of the financial statements of that particular issuer. We call those the white sheets. Those, that yellow sheet and those white sheets, were distributed to purchasers of the commercial paper of Penn Central or whatever issuer we happened to be talking about. So that was done at that time in terms of Penn Central.

Q Did you in connection with your ongoing credit review, review data that then went into the credit department?

A In connection with the ongoing review?

Q Yes.

A Yes, sir.

Q Did you consult the credit file from time to time?

A Yes, I did.

Q After July 1968?

A Yes, I did.

Q Was that true up through March 16, 1970?

A Yes, sir.

Q Did you, from time to time after July 1968, up to March 16, 1970, form an opinion as to the credit-worthiness of Penn Central?

MR. STITT: I object to the phrase "from time to time."

Q On an ongoing basis, have an opinion as to the credit-worthiness of Penn Central?

A At no time did I have an opinion other than that Penn Central was credit-worthy.

Q Did you have any doubt as to the credit-worthiness of Penn Central?

A Whether it be, Mr. Maney, Penn Central or any other issuer, if there was ever the slightest doubt --

THE COURT: He is only asking you about Penn Central.

THE WITNESS: Never had a doubt.

Q Was that conclusion based upon a review of the credit file as it existed at any given time?

A Yes, sir.

MR. MANEY: Your Honor, at this time I will offer Exhibit A in evidence, up to March 16, 1970. As constructed it goes beyond that date.

THE COURT: Yes, Mr. Sitt?

MR. STITT: Your Honor, just subject to the objections which I made in the pretrial order which were basically relevance.

THE COURT: What?

MR. STITT: Basically relevance.

THE COURT: Relevance? You challenge their credit rating? How can it be irrelevant when they produce what they relied on?

MR. STITT: Could I have the numbers of these documents to which my adversary refers?

THE COURT: He is offering the whole file.

MR. MANEY: A- -- and then any number except those dated after March 16, 1970. Again with a notation it would only be those items which we specifically called to the Court's attention --

MR. STITT: All these B numbers 1 through 25, Mr. Maney, for example?

MR. MANEY: It would not include A-3, A-4, A-5, A-6, A-7, any document that was received on or before March 16, 1970 into the credit file is being offered.

MR. STITT: That group, the only objection I would have would have been 10, because I thought it was mis-described and was not a document found in the 1969 annual report. But it is a document in the file, regardless of what it is. I suppose it will be received.

MR. MANEY: With the reservation of the date, I am offering A-1 through 376.

THE COURT: He is raising an objection to A-10. What is A-10?

BY MR. MANEY:

Q Mr. Vogel, would you look at Exhibit A-10?

A Yes, sir.

Q Will you tell the Court and Mr. Stitt what A-10 is?

A A-10 is a balance sheet of Penn Central Transportation Company and consolidated subsidiaries and a balance sheet of Penn Central Transportation Company alone, non-consolidated.

THE COURT: What's the objection to that?

MR. STITT: I haje none now that the witness has given that testimony. Number 193, your Honor, Page 115 of the pretrial order, our position is it is mis-described, but no objection to the document tendered, letter of November 7, 1969 from Mr. Fisher to Mr. Castle, regarding Penn Central securities matters.

MR. MANEY: I am not sure I understand Mr. Stitt's objection. I am offering the document, not the description thereof in the pretrial order.

THE COURT: The objection is overruled, if there are any.

MR. MANEY: Your Honor, at this time, the defendant would withdraw the proffer of any exhibits already received in evidence that have the prefix A.

THE COURT: All right. A is in.

(Defendants' Exhibit A was received in evidence.)

THE COURT: Didn't A come in under Mr. Van Cleave's testimony?

MR. STITT: He had the files in front of him, your Honor, and I don't know that they were received.

THE COURT: He didn't offer them?

MR. PIEL: Your Honor, each one of the documents in the credit file has also a separate number and reproduced copies bearing that number have been separately offered.

THE COURT: All right. A is in.

MR. PIEL: Mr. Maney is withdrawing the ones previously designated A in order to avoid a duplication, but they are subnumbered in the file so the reference to them--

THE COURT: I think you still have to leave them in because anybody reading the record would have to know the specific document you are talking about. Leave them in.

MR. PIEL: Thank you, we will do that.

MR. STITT: Do I take it the entire file is going in, your Honor?

THE COURT: The entire file through March 16, 1970.

MR. MANEY: Your Honor, for the record, each of the documents in Exhibit A has been numbered in pencil by number with A-1, A-2, so that the document can be located that way as well.

THE COURT: I understand.

BY MR. MANEY:

Q Mr. Vogel, could you please explain to the Court the various portions or subparts of Exhibit A, what they are?

THE COURT: He doesn't have to do that. I am only goingto look at any specific exhibits or subexhibits that you want me to. I am not going to look at the file.

Q Mr. Vogel, I ask you to look at A-249 and 249A and 250, these are just page references, your Honor.

Mr. Vogel, calling your attention particularly to the two pages, one entitled "Major Pen n Central Company Banks," I ask you what was the purpose of that document, if you recall?

A To put on the yellow sheet of Penn Central that we were developing, I am sure.

Q I call your attention to the next page numbered A-250. Did you see this document when it was received?

A I don't recall specifically seeing it.

Q Do you recall seeing it at any time thereafter?

A I am certain I did. I just don't recall --

Q Do you recall whether it had any credit significance to you at that time?

A Well, in every case we ask for a list of a company's -- every credit situation, a list of the company's banks and bankers so that we have an indication of where that company is known to banks. In bank-type of accommodations, your Honor, if you have, say, balance at a bank for some period of time, normally speaking if that company will comein and ask you for a loan, you don't have a legal commitment to do it, but you do have a sort of moral obligation to give them at least favorable consideration or in depth consideration. So to the extent that the company had a lot of banks, it certainly indicated to me, at least, that it had that potential call.

Q From the end of July, 1968 through the balance of that year, do you have any recollection of any communication with anyone concerning Penn Central?

A Not especially, no.

Q From the beginning of 1969 into the summer of 1969, do you have any recollection of any communication, conversation or event concerning Penn Central?

A Not any particular conversations, but events, yes. We had -- the year end reports came out, and so forth.

Q Do you recall anything that was done with the year end report?

A Yes. As was customary, a review was written by one of our analysts on the -- was that the 1969 annual report we are talking about? -- and sent to me.

Q Do you recall anything else?

I am talking about January, 1969 through the summer of 1969.

A In terms of contacts with railroad people? Not that I can recall.

Q Mr. Vogel, would you look at the page in Exhibit A numbered A-217. It is identical to the document already received as F-49 in evidence.

A I have it.

Q Does that refresh your recollection as to any communication or conversation that you had with respect to Penn Central with anyone --

A No, it does not.

Q Mr. Vogel, I show you Exhibit B-19 for identification and ask if you can explain to the Court what that document is?

MR. STITT: May we have that described by date?

Q Entitled "Credit Agreement as of April 1, 1969." would you just tell us what it is?

A It is a credit agreement between Penn Central Company and First National City Bank as agent for a group of banks.

Q Is that what is called a revolving credit agreement?

A I believe this is the revolving -- yes.

Q What is the amount of the agreement?

A This revolving credit agreement was for $300,000,000.

Q Would you explain what you mean by the phrase "revolving credit agreement"?

A A revolving credit is one where -- there are usually two parts to it. One is what they term to be -- it is a contractual agreement between banks and a particular borrower. Usually there is a revolving part which is basically 90-day type of loans over a contracted period, say two or three years, or whatever.

THE COURT: With a limit on what can be outstanding during the 90-day period?

THE WITNESS: Up to the maximum of 300,000,000, your Honor, whatever the maximum of the revolving credit happens to be. During the term revolving period, they are permitted to borrow or pay down or borrow again up to the maximum of 300,000,000.

THE COURT: All right. That's the first part. What's the other?

THE WITNESS: The second aspect of the revolver is an ability to term out at the end of the "revolving period" -- "term out" meaning for some period of upwards of, say, five years, whtever is outstanding at the termination of the revolving part, the bank can extend what is known as a term loan for five years, or banks will extend a term loan for five years, so at that point it becomes rather than a 90-day note it becomes a five-year note, with appropriate amortization.

Q Do you know whether the entire $300,000,000 was available for borrowing under this revolving credit agreement, Exhibit B-19?

THE COURT: When?

Q At the time it was entered, as of April 1, 1969.

MR. STITT: Can we fix the date of the witness' knowledge of this agreement?

A I knew of a $300,000,000 revolver having been negotiated. I did not know if there were any restructions on the amount that may be borrowed under it at that time.

I had not seen the revolving credit agreement yet.

Q Did it have anything to do with commercial paper?

A There was a -- you mean in terms of the credit evaluation of commercial paper?

Q No, I am talking about any relationship between commercial paper and the revolving credit agreement.

A Yes, there was a $50,000,000 limitation in the reolver, if you will, that could be used only to pay off maturing commercial paper if it couldn't be sold.

Q Do you remember when you became aware of the existence of the revolving credit agreement?

A Some time in the spring of 1969.

Q Did you receive a copy of the agreement at that time?

A No, I did not.

Q Did you thereafter receive a copy of the agreement?

A Yes, I did.

Q Were you aware of the terms of the revolving credit agreement prior to receiving a copy?

A Only in generalities, the amount, and so forth, and that it was a revolver.

Q Mr. Vogel, I call your attention to the blue sheet in Exhibit A which is numbered A-89. It is the original of which a copy is already in evidence as F-22, dated September 3, 1969.

A I have it.

THE COURT: Are you offering B-19 in evidence?

MR. MANEY: No, your Honor.

THE COURT: You are not?

MR. MANEY: No, your Honor.

Q Do you recall whether you received a copy of that blue sheet, Mr. Vogel, at or shortly after the date it bears, September 3rd?

A I am certain I did.

Q Did you in fact receive all blue sheets?

A Yes, I did.

Q Was that a matter of general procedure in 1969?

A Yes, it was. We had a woman who was assigned the responsibility of taking all blue sheets relating to commercial paper issuers, putting them in an envelope and sending them to me.

Q That blue sheet, F-22 in evidence and also Page A-89, refers to a meeting scheduled for September 12th. Did that meeting take place?

A Yes, sir.

Q Did you attend that meeting?

A Yes, I did.

Q Did it take place on September 12th?

A Yes, sir.

MR. STITT: Your Honor, the plaintiff will stipulate that the September 12tn meeting is the same meeting which is the subject of a blue sheet in evidence as

Exhibit F-7, but has a date of September 19, 1969, a memorandum prepared by Mr. Vogel under that date. We will stipulate that this should refer to the meeting of September 12th and probably should have been dated September 12th rather than the 19th.

MR. MANEY: I will stipulate that it was a meeting of September 11th.

MR. PIEL: You mean 11th rather than 12th?

THE COURT: 11th?

MR. STITT: I agree, your Honor.

Q Mr. Vogel, do you see the blue sheet to which Mr. Stitt referred, which is on the same page?

A Yes, I do.

Q I believe it is numbered A-90 on your copy.

A Yes, it is.

Q It is F-7 in evidence. Not looking at that blue sheet dated September 19th, do you recall that meeting?

A I recall having a meeting in and around that period in the fall. I don't recall much beyond that.

Q Do you recall the subject -- any subjects that were discussed?

A The only recollection I have is that we did have a discussion on bank lines.

Q Who is "we"?

A Well, O'Herron, John O'Herron, as I remember, it was the first time I met him, at least, at Goldman, Sachs. O'Herron and I believe Bob Wilson was there. I can't remember who else.

Q Do you remember what was said on the subject of bank lines?

A The only thing that I can recall specifically is that there was a discussion of a lot of little banks in connection with the bank lines, and that O'Herron was not enamored with the idea of approaching these little banks.

Q What do you mean by a lot of little banks?

A Within the context of getting additional credit lines, he would have to have at that time, as I remember, he would have to have contacted some of his smaller banks and corral a lot of additional lines from a lot of small banks requiring a lot of effort and time, where he could go to the First National City Bank and get $50,000,000 like that, assuming your credit is all right, but to go to a lot of little banks takes a lot of negotiations. I am not saying you can't get it, but you have to talk to a lot of people before it gets rounded out.

Q There is a reference to lending limits?

A Yes, exactly.

Q Do you have any recollection of anything else discussed at that meeting?

A Not particularly, no.

Q Mr. Vogel, would you look at the blue sheet, F-7, marked also A-90, and I call your attention to the last sentence on that blue sheet, "John," referring to O'Herron, "also pointed out that the company will be in a very tight cash position in the first quarter of 1970 and asked if we could put out as much paper as possible in April or longer."

Do you recall the substance of that sentence being discussed at the meeting?

A I don't have a total recollection of it, no.

Q Do you have any recollection of it?

A No, I can't say that I do.

Q I show you Exhibit AM-2 for identification and ask if you can identify that volume?

THE COURT: I suggest we have a short recess.

(Recess.)

MR. STITT: With the permission of my adversary--

THE COURT: Wait. What about this AM-2? Are you still playing with that?

MR. MANEY: Yes, your Honor. Mr. Stitt wanted to correct an earlier reference on the record.

MR. STITT: In my rebuttal to Mr. Piel, I meant to refer to Mr. Bevan's testimony at 109 to 110 and not to

143 to 144, as I had.

BY MR. MANEY:

Q Do you have AM-2 in front of you?

A Yes, I do.

Q Is that the 1968 annual edition of Moody's Transportation Manual?

A That's correct.

Q When was that received by Goldman, Sachs?

A Some time in the fall of '69 -- '68, excuse me.

Q Was that used by you as a reference work from the fall of '68 to the fall of '69?

A Yes, sir.

Q Was it used by you in your ongoing review of the Penn Central?

A Yes.

Q And its component corporations?

A Yes.

MR. MANEY: I offer AM-2 in evidence.

THE COURT: Same objection, same ruling.

(Defendants' Exhibit AM-2 was received in evidence.)

Q Mr. Vogel, I show you AM-3 for identification and ask you if that is the 1969 annual edition of Moody's Transportation Manual?

A Yes, it is.

Q Was that received by Goldman, Sachs in the fall of 1969?

A Yes, sir.

Q Was it used by you in your ongoing credit review of Penn Central from the fall of 1969 to at least March 16, 1970?

A Yes, sir.

MR. MANEY: Offer AM-3 in evidence, your Honor.

THE COURT: Same objection, same ruling.

(Defendants' Exhibit AM-3 was received in evidence.)

Q Mr. Vogel, you were talking about a meeting on September 11th. Do you recall the next event after that meeting of September 11th related to Penn Central in which you were involved?

A We had another meeting later on in the year in which I was involved.

THE COURT: With whom?

THE WITNESS: With people from Penn Central.

THE COURT: When?

THE WITNESS: It was in, I believe, December, your Honor.

THE COURT: Do you have a document which will refresh the witness' recollection as to the exact date?

A Mr. Vogel, if you would look at the blue sheets, find the blue sheet dated September 19th, which is F-7, calling your attention to the meeting recorded in the blue sheet dated September 19th, F-7 in evidence, I ask you if by reference to the blue sheets you can detect the next event that had any involvement -- in which you had any involvement thereafter?

A Shortly after that meeting, I got a phone call from an officer of the First National City Bank who had some concerns about whether or not we were going to be able to market Penn Central's commercial paper, and he had heard, a competitor of ours had told him that he didn't think we were going to be able to do the job, apparently, and since they were the leading bank in the revolving credit, they were concerned about that, and in fact he even suggested they might increase the revolver to take care of any potential.

Q Increase the what?

A They might increase the revolving credit to take care of any run-off in paper.

THE COURT: Wait.

THE WITNESS: That was my understanding.

Q What was the date of that call?

A It was shortly after -- there is a blue sheet here which I wrote.

THE COURT: I thought you were talking about a meeting held on September 19th.

MR. MANEY: The blue sheet is dated September 19th, your Honor. Mr. Stitt stipulated that the meeting --

THE COURT: You are not going to ask the witness any questions about what happened at that meeting on September 19th?

MR. MANEY: I asked him if he recalled the meeting and he said he did not.

THE COURT: Then I asked you to show him a document which might recall the meeting to him, and you referred to this blue sheet. Now I am asking you, are you going to ask him any questions about this meeting or are we going past September 19th?

MR. MANEY: We are going past September 19th, your Honor.

THE COURT: All right.

Q You were referring to a conversation with an officer of the First National City Bank?

A Yes, sir.

Q What was his name?

A Patrick Bowditch.

Q Are you referring to a blue sheet to refresh your recollection as to the date?

A Yes, sir.

Q What's the recollection of that blue sheet?

A October 3, 1969.

Q Is that numbered A-84?

A A-84, yes, sir.

Q Going back to the meeting of September 11th in the blue sheet of September 19th --

THE COURT: Mr. Maney, you've got me lost. You've got me up at October 3rd. Where are you taking me from there?

I gather that this document reflects the conversation with Bowditch?

THE WITNESS: Yes, sir, it does.

Q Did that document with Mr. Bowditch have any credit significance to you?

A A great deal of credit significance to me. It certainly reinforced my opinion when an officer of the leading bank in a revolving credit tells me that he agrees with me that the credit is fine and there is a possibility they might increase the revolver because of problems we may be having in terms of marketing the paper. I just think that was an enormous calculation in terms of our attitude towards Penn Central.

Q I show you a document already received as A-187, part of Exhibit A, an article from the Wall Street Journal relating to the passing of a dividend. Do you recall whether you became aware of the substance of that article at or shortly after the date of that article?

A If you mean that they cut their dividend, yes.

Q They eliminated the quarterly dividend?

A Yes.

Q Did that have any credit significance to you?

A It certainly indicated to me that the management of the company was taking steps to conserve their cash, which I thought was a very positive move.

Q I believe you earlier referred to a meeting that you had in December, is that right?

A In December, yes, sir.

Q Was that the next event in which you were involved in any way relating to Penn Central?

A That's the only one that I recall at this point in time, yes, sir.

Q Would consulting your blue sheets refresh your recollection as to whether anything happened after your conversation with Mr. Bowditch --

A The only other thing that I can remember during that period was that there was a name change which was finalized on, I believe, October 1st, and some of the documents relating to that name change I remember getting personally. So that event I do recall. As a matter of fact, it was sort of confusing. They changed -- for example, your Honor, it started out as Penn Central --

THE COURT: We have been through it, Mr. Vogel.

Q Mr. Vogel, when was the meeting about which you just spoke earlier? When did the meeting take place?

A There was one in, I believe, December.

Q When in December?

A I don't recall exactly. Some time in the early part of December.

Q Would reference to your blue sheets help you in establishing the date of the meeting?

A Yes, sir.

Q Please do so.

THE COURT: Can you tell him what page to look for?

Q A-79.

A December 9th.

MR. MANEY: The blue sheet, your Honor, is presently in as F-9.

MR. STITT: Correct.

Q Without looking at that blue sheet, can you tell us as best you can recall what took place at that meeting?

THE COURT: What's that date again, please?

MR. MANEY: December 9th, your Honor, 1969.

A I don't recall anything specific other than there was a brief discussion about bank lines.

Q Would you look at A-79, which is also F-9, and read it and see if that refreshes your recollection?

(Pause.)

A Not other than what is recorded here in the blue sheet.

Q Mr. Vogel, do you recall at the September meeting Mr. O'Herron making reference to a public financing that was contemplated?

A Oh, yes. There was talk about a public financing.

Q Did that financing ever take place?

A Yes, it did.

Q When did that take place?

A In December.

Q Mr. Vogel, would you look at Exhibit A-12?

A I have it.

Q Tell the Court what it is.

A That is a prospectus covering the $50,0-0,000 Pennsylvania Company sinking fund debenture issue, due in

1994.

Q Do you know whether that offering was sold?

A Yes, it was.

Q Did that document have any credit significance to you?

A Yes. As a matter of fact, I used this document quite extensively because it was the first one that I had seen with the Pennsylvania Company described in such great detail.

Q I call your attention particularly to Page 7 of that document. Is that part of the detail you were referring to?

A Yes, sir.

Q This being a list of companies in which Pennsyvania Company had investments?

A That's correct.

Q With a market or estimated value as of the date of the circular of $922,000,000?

A Yes, sir, and I used these companies in calculating what I termed to be usable assets, assets that could be used to be either pledged, sold, or maybe even as in this case it was part of their North Western stock was -- these debentures were convertible into Norfolk & Western Railroad Company stock. So some of these assets here I looked to as part of what I considered to be usable assets, if the railroad needed to use them to raise money.

Q Were these assets unencumbered?

A Some where and some were not.

Q Does that circular indicate the extent of the encumbrance?

A I believe it did.

Q Mr. Vogel, would you look Page A-13.

A I have it.

Q A-13 consists of two pages. Could you explain to the Court what those pages are?

A Yes. It is a list of the banks that were extending combinations in one form or another to Penn Central -- the banks that were in the $300,000,000 revolving credit, the banks that were in the $50,000 Euro revolving credit and those banks that were involved in the standby lines of credit to back up commercial paper, not related to the revolving credit and some calculations as to the possible legal limits of the major banks.

Q This was prepared from documents such as the revolving credit agreements?

A Revolving credits, Euro revolver, and so forth, yes, and the list of standby unsecured lines of credit, the standby for credit, back-up commercial paper.

Q When you say standby lines of credit, what are you referring to?

A These are lines of credit whose specific purpose is to be drawn down only to repay maturing commercial paper that can't be sold.

Q Where is that reflected on A-13?

A I believe it is in the column labeled, "Lines, $50,000,000."

Q Does that column include the First National Bank of Chicago?

A Yes, it does. 5,000,000.

Q What was the nature of these lines, the nature of the commitment?

A These were basically standby lines to -- solely to be drawn down for the payment of maturing commercial paper that couldn't be sold. It was strictly unsecured lines. My understanding was that should the banks that are extending these lines elect not to honor them, they certainly had that option.

Q To your knowledge, were these standby lines eventually all drawn down?

A The bulk of them were, yes. I believe there was a couple of out-of-town banks and non-New York City banks that were not drawn down. Incidentally, I don't know whether

I mentioned it or not, but there is a notation which undoubtedly was put on later than this was prepared, put on by someone, covering the $50,000,000 bridge loan, which was negotiated around the early part of 1970 as a bridge to the financing that was coming up or contemplated.

Q Do you remember when the next event was with which you had any contact relating to Penn Central after the meeting of December 9th?

A Direct contact with Penn Central?

Q No. Contact with anyone or communication with anyone relating to Penn Central.

Q I know in early February we -- there were meetings with Penn Central to which I was not a party, but but certainly kept abreast of what took place at those meetings.

Some time in February they announced their year-end earnings, I believe.

Q Do you remember when you first became aware of the year-end earnings?

A I don't know the specific date, but I do know that Bob Wilson came over to me this day and said to me, "Jack, I just" -- words to this effect, your Honor. I don't remember the specific words, but, "They are announcing a write-off of some $125,000,000, and therefore, what does that mean to you? Is that something we should be concerned about?"

I told him that, no, it didn't represent any cash drain on the Penn Central, that all it represented was a write-off of obsolete facilities, which was very customary. With a company with a net worth of $3,000,000,000 it was really nothing.

Q Do you recall what was the next event -- you said right after Mr. Wilson told you they just announced --

A I believe so, because he came right to my desk and I remember the circumstances.

Q Mr. Vogel, would you look at the blue sheet, A-71, which is also in evidence as F-2.

Do you have that blue sheet dated February 5, 1970?

A Yes, sir.

Q Do you recall receiving a copy of this blue sheet?

A Yes, sir.

Q Do you recall whether you discussed the substance of it with Mr. Wilson before you received the blue sheet?

A I don't recall specifically, but normally if it was anything as important as this, he would.

Q Did you, after becoming aware of the information on this blue sheet, have a conversation with anyone else besides Mr. Wilson?

A Right about that same time I had a conversation with a gentleman from National Credit Office.

Q What was his name?

A Alan Rogers.

Q Who is or was Alan Rogers?

A Alan Rogers was a senior analyst and a senior man in the National Credit Office Division that rated commercial paper. I had known Alan for not only all the years at Goldman, Sachs, but prior to that when I was with the Grace National Bank. He is a very fine gentleman.

Q Under what circumstances had you known Alan Rogers?

A Both in terms of commercial paper and even prior to that when I was with the bank, my boss at that time regarded him as somewhat of an expert on finance companies, and I remember one day, for example, we went over to visit with Alan to talk about some finance companies my boss was thinking about extending a line of credit to.

Q Incidentally, is Mr. Rogers still iving?

A No, he passed away.

Q Do you know when?

A I really don't know. I know he had a debilitating kind of disease, where because he was so valuable they allowed him to operate out of his home, but I don't know exactly when -- I think it was '71 or '72, somewhere in there.

Q In early 1970, was he operating out of his home?

A Yes, sir.

Q During the course of your years of association with Mr. Rogers, had you formed any opinion as to his qualifications and competence as a credit analyst?

A Mr. Rogers was qualified and competent when I was a baby in credit analysis. There is no question about it, he is one of the finest men I have ever met.

Q Do you know whether he had the authority in February of 1970 to confer a rating on a commercial paper issuer?

A Confer a rating?

Q Yes.

A I presume he had. I don't know specifically.

Q You said you had a conversation with Mr. Rogers. Do you remember that conversation?

A Not independently, no.

Q Independently of what?

Q The blue sheet.

Q Is there a blue sheet on the conversation?

A Yes, sir.

Q Do you have a copy of it in front of you?

A Yes, sir.

Q Is that A-71?

A My copy says A-75.

MR. MANEY: Which is also in evidence as F-1, your Honor.

MR. STITT: Correct.

Q Would you read that blue sheet, Mr. Vogel, and see if that refreshes your recollection as to the conversation?

A Not other than what is recorded here in the blue sheet.

Q I am asking you, do you remember the conversation?

A Yes, I remember having a conversation.

Q Do you remember any of the subject matter of the conversation?

A Other than what is recorded here in the blue sheet --

Q I am asking you if you remember the conversation, the substance of the conversation.

A The substance of the conversation?

Q Yes.

A Basically, I remember that we had this discussion as I have recorded in the blue sheet. The substance was the earnings of -- that were announced that day of Penn Central and my reaction to them.

MR. STITT: If your Honor please, I believe the witness has testified twice now that his recollection of this conference is solely as recorded in this blue sheet.

THE COURT: That's what he said.

MR. MANEY: I wasn't clear that that was established, your Honor.

Q Prior to the conversation with Mr. Rogers on February 5th, were you aware whether NCO had formed any opinion as to the credit-worthiness of Penn Central?

A Opinions?

Q Yes.

A Well, one that obviously they were rating it prime, which indicated that they continued to feel it was a prime name, but I believe there is in the file a memorandum issued by National Credit Office in the fall of 1969 which stated that they were quite confident at that time that Penn Central had sufficient assets to meet its obligations.

Q Is that memorandum in the credit file?

A It certainly is.

Q Could you locate it for us? I suggest you look for A-163.

(Pause.)

Q With the Court's permission, would you read the last paragraph of that document, Mr. Vogel?

A Yes, sir. It says, "From this office point of view, the commercial paper standing of this company is not affected because of the readily available assets of the subject if the need arose."

MR. STITT: May we have the date?

THE WITNESS: The date on this is October 28, 1969.

Q Is this a report dealing with the nine month earnings?

A Yes, sir, it is.

Q Do you know whether Mr. Rogers participated in any way in the approval of that release, A-163?

A I can't believe that this would have gone out without his or some other senior man's approval.

Q Would that have been an independent judgment of Mr. Rogers?

MR. STITT: I object to the form of that -- withdrawn.

THE COURT: Sustained. Sustained.

Q Do you know whether in February, 1970 Mr. Rogers had any source of information available to him besides

Goldman, Sachs?

A Yes, sir.

Q How did you know that?

A Common knowledge. Alan had contacts in every bank in the city, close contacts.

Q Did NCO have any contacts with issuers?

A I am certain they had contacts with the issuers, yes, sir.

MR. STITT: If your Honor please, I believe this testimony is speculative, unless this witness has personal knowledge of what these contacts were with regard to Penn Central.

THE COURT: I agree.

THE WITNESS: Did you want me to elaborate, your Honor?

THE COURT: Oh, no.

Q Did your conversation with Mr. Rogers on February 5th have any credit significance that you can recall?

A None that I can recall.

Q Mr. Vogel, did you attend a luncheon meeting with officers of Penn Central on February 6, 1970?

A No, I didn't.

Q I call your attention to the blue sheet marked A-69; it is in evidence as F-3. It is also in evidence as

F-3, I should say.

MR. STITT: Correct.

Q A-69, dated February 6, 1970, two-page blue sheet.

A Yes, I have it.

Q Did you receive a copy of that blue sheet on or about February 6th?

A Yes, I did.

Q After reviewing and reading the blue sheet, do you recall whether you did anything?

A Yes, sir.

Q What did you do?

A There were some very important materials developed in that meeting, and I reviewed that material in connection with what I considered to be the railroad's ability to finance its upcoming obligations, and then concluded on the basis of that review that the railroad continued to be a credit-worthy railroad.

Q What specifically did you review to reach that conclusion?

A On a continuing basis, right from the day one, so to speak, this was a railroad that had no -- the combined railroad had no real track record to speak of in terms of its railroad operations. It had an enormous balance sheet,

$6,000,000,000. It had enormous assets, assets that in my opinion were valuable. So that if it took time for the "merger" to jell and the economies everyone expected at the time it was done -- if it took time for those economies to develop, they had assets or staying power, as the economists say, your Honor, they could use to pledge or borrow against-- or even in the case of -- amply demonstrated just a short time ago from the date of that memo, prior to that in terms of the Pennsylvania Company debenture, they used their Norfolk & Western stock as convertible on that one.

So these, in viewing the sum of these assets on the basis of the information I had received in the blue sheet, I concluded that there was still more than ample assets to cover any financial requirements they may have.

MR. STITT: Your Honor, I believe the question called for what he did. It may be that in the last part of that answer we finally got it, but I would make an objection.

THE COURT: Overruled.

Is this a good time to suspend, Mr. Maney?

MR. MANEY: Fine, your Honor.

THE COURT: 2:00 o'clock.

(Court adjourned.)

AFTERNOON SESSION

(2:00 p.m.)

JACK VOGEL, resumed.

THE COURT: Go ahead.

CONTINUED DIRECT EXAMINATION

BY MR. MANEY:

Q Mr. Vogel, I think at the luncheon recess you had before you the blue sheet of February 6th, A-69, also Exhibit F-3?

A I have the A-69 exhibit.

Q I call your attention to the sentence at the very bottom of that page running over to the second page. "Both Dave Bevan and John O'Herron responded to our ideas by saying they did not feel they could get $100,000,000 in bank lines at this time."

Do you recall whether you had any understanding at the time that you read that sentence of what that statement meant to you?

MR. STITT: I object to the form of the question.

THE COURT: Overruled.

A Yes. It was my understanding at that time that this was a temporary situation brought on by the tight money market at the banks and that they were just saying that at this point in time the banks were unwilling for tight money reasons to grant them additional lines.

Q Did that have any credit significance to you?

A None whatsoever.

THE COURT: If money became due, where were they going to get the cash from?

THE WITNESS: Well, your Honor, I think it's in terms of a -- a bank line is a forward commitment and it may be exercised at some point of time when the bank's own ability to make loans is complicated. I think most banks would much rather in this kind of money market make a loan to a company where they know they have a definite pay-out period and we're going to make our loan today and we know where our funds are coming from and so forth, so to that extent I see as far as that's concerned, there was nothing in that of a "credit significance."

THE COURT: All right.

Q Did Penn Central in your opinion have the capacity to borrow on February 6, 1970?

MR. STITT: I object to the form of the question.

THE COURT: Overruled.

A Yes, sir. As a matter of fact, it was only a short time later that they arranged the swing lines -- or rather the bridge loan.

MR. STITT: Is this referring to the Penn Central Transporation Company, the Pennsylvania Company or the Penn Central Company?

THE WITNESS: In the case of the bridge loan it was the Pennsylvania Company which was making the money available to the railroad.

Q Part of the Penn Central Company and consolidated subsidiaries?

A It is an unconsolidated -- not a consolidated, but a wholly-owned subsidiary of the Penn Central Transportation Company.

Q Mr. Vogel, could you read over the blue sheet of February 6th, A-69.

MR. STITT: 69?

MR. MANEY: Yes. A-69 and it is also F-3.

Q I believe your prior testimony was it had a lot of important information. Could you identify some of that important information?

A Yes. They were talking about -- something that was very positive, they were talking about cost reductions in terms of their earnings for the coming year, they were talking about how they planned on meeting their capital requirements for 1970, they talked about the -- an operating loss in the railroad. As a matter of fact, it looked like they were talking about an improvement in that the consolidated profits were going to be increased from the previous year to something like 25,000,000, all of which I thought was important. They talked about doing their upcoming financing which was a very positive indication of their attempting to meet their upcoming cash requirements.

Q Did you, after reading the blue sheet of February 6th, A-69, have any doubt as to the credit-worthiness of Penn Central?

A Absolutely none.

Q Mr. Vogel, would you look at the next blue sheet, which I think in order is the second page of A-69, with a date of February 12th?

MR. STITT: Also F-4.

Q Also F-4. A-70, F-4.

Is that not part of the same?

THE COURT: I have it.

MR. MANEY: You have it, your Honor?

All right.

Q Did you read that blue sheet?

A I am certain I did.

Q Was there anything in that blue sheet that had credit significance to you?

A Yes. There was an indication that they were finalizing their bridge loan.

Q Could you identify where that appears?

A It says, "John told me he has heard from a number of the banks and they have already obtained 35 out of 50,000,000 increases along the lines that we are asking for."

Q Is there anything else in that blue sheet that had credit significance to you?

A No. Except that they were able to buy back 10,000,000 in notes without any problem.

Q What significance did that have to you?

A That the railroad had cash or access to cash to be able to buy back notes.

Q Is there anything else in that blue sheet that had credit significance to you?

A No.

Q Would you look at the next blue sheet, which is A-66, I believe, F-16, dated February 12, 1970, by Mr. Tripi.

Did you read that blue sheet, Mr. Vogel?

A Yes, sir. I am certain I did.

Q Is there anything in that blue sheet that had credit significance to you?

A Only it mentions that they were buying commercial paper through us. The figure $60,000,000 is just an indication that they had cash available at that time to actually invest.

Q Is there anything else in that blue sheet that had credit significance to you?

A Not especially, no.

THE COURT: You mean this was a buy-back of 60,000,000?

THE WITNESS: No, I think it was just a straight investment, your Honor, a sale of commercial paper to the railroad.

Q Is that commercial paper of issuers other than Penn Central?

A Yes.

THE COURT: I don't understand that. Why didn't they buy back their own stuff?

THE WITNESS: Why did they buy it?

THE COURT: Why didn't they buy back their outstanding commercial paper rather than invest it in others, do you know?

MR. MANEY: I don't know that this witness will be able to cover that, your Honor.

THE COURT: All right.

MR. STITT: Your Honor, maybe he could answer it to the best of his ability. Why don't we give him a chance?

Q Do you know, Mr. Vogel?

A The suggestion I would make is that --

THE COURT: Wait. You are guessing. Go ahead, next question.

Q Would you look at the next blue sheet, Mr. Vogel. I believe it would be the one dated February 26th, which is F-13 and it would also be A-67.

Is there anything in that blue sheet that had credit significance to you?

A No, sir.

Q Would you look at the next blue sheet, which I believe is A-64, also F-10. It is a blue sheet dated March 5, 1970 by Mr. Van Cleave.

Did you read that blue sheet, Mr. Vogel?

A Yes, sir.

Q Is there anything in that blue sheet that had credit significance to you?

A Yes. That they finalized the bridge loan, $50,000,000, and it was with the Chemical Bank as lead bank.

Q Is there anything else in that blue sheet that had credit significance to you?

A Not especially, no.

Q The next blue sheet is dated March 17th.

A No, none.

Q No, I said and the next blue sheet is dated March 17th.

A No, I'm sorry.

Q Do you recall whether anything else came to your attention prior to March 16th with respect to Penn Central that had any credit significance to you?

A Not that I can recall.

THE COURT: When you use the word bridge loan what do you mean?

THE WITNESS: This was a loan that was being established to bridge the possible financing that was upcoming. It was a loan made by the banks to the Pennsylvania Company to enable them to get some of the financing proceeds ahead of the financing, should they need it.

THE COURT: Means nothing to me.

THE WITNESS: Your Honor, if you are scheduled to take down a financing, let's say, in April you would like to have some portion of the financing in February. You arrange a bridge loan and that bridge loan is intended to cover that interim period between the February bridge loan and the take-down of a more final financing in April. That's what a bridge loan is.

Q Mr. Vogel, I call your attention again to the blue sheet of February 6th, F-3, and to the language in approximately the middle of that first page.

A Excuse me. We are at the February 6th blue sheet?

Q The February 6th blue sheet in the middle of the second paragraph, discussing a $100,000,000 long-term financing.

It says, "The timing on doing this $100,000,000 of Penn Central Company debt was not clear other than the fact that they were going to get started on it in the near future. In the interim they hoped to set up $50,000,000 lines which will be used to carry them over until they do the $100,000,000 bond deal."

Was that bond deal eventually a proposed offering of Pennsylvania Company?

A Yes, sir.

Q And was the bridge loan the $50,000,000 of lines to carry them over until the bond offering could be made by the Pennsylvania Company?

A Yes, sir. That was the bridge loan.

THE COURT: All right.

Q I show you Exhibit AM-4 for identification and ask if you can identify what that document is.

A This is a March 6, 1970 Moody's Transportation --

the biweekly updates published by Moody's in connection with the Moody's Transportation Manuals.

Q Is this something you received on or shortly after March 6th?

A Yes.

Q What use was this particular page of that biweekly update, Page 1774?

A It had the year end numbers for Pittsburgh and Lake Erie Railroad. It's one of the assets that I had been looking at for some time.

Q By "numbers," you mean the results of operations?

A Yes.

Q For the Pittsburgh and Lake Erie?

A That's right.

Q Is that a subsidiary of Penn Central Transportation Company?

A Yes, sir, it is.

MR. MANEY: I offer AM-4 in evidence, your Honor.

MR. STITT: No objection, your Honor.

THE COURT: All right.

(Defendants' Exhibit AM-4 received in evidence.)

Q Mr. Vogel, on or shortly before March 16, 1970, did you have an opinion as to the credit-worthiness of Penn Central Transportation Company?

A Yes, I did.

Q What was that opinion?

A That it was credit-worthy.

Q On what was that opinion based?

A Based on my review up to that date.

Q Review of what?

A Of the credit files and the statisical manuals, all of the information that was available to me.

Q What did you see in that review that led you to that opinion?

A I think I have mentioned this before. What I tried to do, particularly in this connection, was to establish various what I considered to be valuable assets that were available to the railroad. If in fact their earnings didn't produce enough cash to meet, from the earnings point of view, their cash requirements, they could take these assets and pledge them or sell them or even make them convertible into another security in lieu of getting cash from operations and I thought that there was more than ample assets to cover their anticipated needs as I knew them.

Q Did you take into account the debt of Penn Central?

A Oh, yes. I tried to take into account the debt of Pennsylvania Company, which was an important part of this concept of usable assets. I took into account the amount that was outstanding under the revolving credit. I took into account the amount thatwas outstanding under our commercial paper. There was a Euro-dollar loan.

I tried to deduct all debt as I knew it from "these usable assets" to come up with what I considered to be a cushion, so to speak.

Q Could you identify some of these usable assets for us?

A Yes, sir.

Q Please do so.

A Well, shall I do it by company? In the transportation company, for example, we had, among other things, accounts receivable, I believe, that ran upward of 300,000,000 accounts receivable. They owned a substantial portion of the Pittsburgh and Lake Erie Railroad. They had a number of --

Q How did you value the Pittsburgh and Lake Erie?

MR. STITT: May we have a point of time fixed?

MR. MANEY: I believe we are referring to just prior to March 16, 1970.

MR. STITT: Thank you.

A How did I value the Pittsburgh and Lake Erie?

Q Yes.

A There was no public markets in that security and I valued that on the basis of an average of three years operating earnings times ten, which would produce, say, double your money in ten years, so to speak. It's a ten-year price-earnings evaluation.

Q Were there any other assets in Penn Central Transportation?

A Yes. There was two of the -- I think Penndel Company is one that comes to mind. Penndel I estimated a potential loan value of approximately $50,000,000. There was another railroad, Ft. Wayne, I believe, I can't remember the whole name, but I had the same thing there.

Q Is that Pittsburgh, Ft. Wayne & Chicago Railway?

A Yes, I believe that's the one. And then there was a three--

Q How did you value that?

A It was an estimate of mine on loan values. Both of these companies were unencumbered and I figured they could get at least $50,000,000 should they want to raise the money.

Q Is that for both or each?

A Each.

Q Were there any other assets you considered usable?

A There was a number of smaller companies. There was a coal company, Clearfield, I believe it was, bituminous coal. There were a number of companies that were all mentioned in this proxy that was in the middle of 1969 which came to my attention.

Q Would that proxy refresh your recollection as to their identity?

A Yes, sir.

Q Can you find it in the credit file, Exhibit A?

A Yes, sir. Yes, sir, it's on Page 15.

Q That's of a proxy statement which is marked as A-17?

A A-17, that's correct. I used -- where I couldn't find in one of the statistical manuals a track record of earnings so I could make this evaluation of non-public securities, in this instance there were a few companies like American Contract which I just accepted the December 31, '68 net asset value which was indicated in this proxy statement, as well as the Manor Real Estate Company, which had, I believe, it's a $27,000,000 net asset value and to the -- and the Clearfield Coals, Clearfield Bituminous Coal Corp., which had a 60 and I believe Dispatch Shops -- a couple of those we knew about, the Dispatch Shop and the Manor Real Estate from previous discussions with the railroad.

Q Those were just net asset values?

A Right. Then this Merchants Dispatch Transportation Corporation, there was a full-blown write-up of that in Moody's and that did have earnings, so I valued that on a ten-times-earnings basis; average earnings for three years.

Q Were there any other usable assets in Penn Central Transportation Company?

A I came up with a figure of approximately $125,000,000 as an overall figure for the value of the real estate.

Q Did you come up with any other usable assets?

A In Penn Central?

Q Yes.

A Well, in the Pennsylvania Company there was a number of them.

Q What did you find in the Pennsylvania Company?

A Well, companies like Arvida, Great Southwest, the Norfolk & Western. Some of these I got out of the prospectus in December.

Q How did you value Arvida?

A Arvida I believe was an over-the-counter security and I just valued it three times the securities owned.

Q How about the Great Southwest?

A That was also over-the-counter.

Q How did you value the Norfolk & Western?

A That was a New York Stock Exchange.

Q What was the source from which you derived the prices of the securities on either the New York Stock Exchange or the over-the-counter market?

A Either in the daily -- you know, the Wall Street Journal or the New York Times or the pink sheets or through our traders, whatever happened to be.

Q Are you familiar with the Investment Statistical Laboratory published by Standard & Poor's?

A Yes, I am.

Q Can you explain what that is?

A That is a record kept over a period of many years so far as I know on stock prices both on the New York Stock Exchange, I believe, the American Exchange and the over-the-counter market, and if you wanted, for example, to go back a couple of years and get the price of a security as of say, March 1968, March 14th, you could get it.

Q I show you Exhibit DN for identification and DO for identification and ask if you can identify what those documents are.

A Yes. This is --

Q Which one are you looking at?

A I am looking at DO, which is the Investors Statistics Laboratory -- this is a publication of Standard & Poor's and that's what I just referred to when you mentioned ISL. This is the sort of information you get.

Q Is DO a compilation of pages from the index for the New York Stock Exchange?

A This is a New York Stock Exchange index, your Honor, right. It's for April, May and June 1968.

Q Does it also contain attached to it three-month segments up through March of 1970?

A Yes. You can get it right through. You can go back further.

Q In that exhibit --

A I'm sorry. I didn't go through the exhibit.

Yes, it does.

Q And is DN the same service for over-the-counter securities?

A Yes, sir.

MR. MANEY: I offer DN and DO in evidence, your Honor.

THE COURT: What do you need this for?

MR. MANEY: Just to establish the market price of some of the securities, your Honor.

(Defendants' Exhibits DN and DO received in evidence.)

Q Mr. Vogel, discussing the Pennsylvania Company, I believe you identified Arvida, Norfolk & Western and Great Southwest. Are there other components to that?

A Yes.

Q Tell us what they were. You may refer to any document in the credit file, Exhibit A.

A The one that comes to mind is the Buckeye Pipeline, which was one of their major investment assets.

Q Is there a public market for the stock in Buckeye?

A No. Buckeye was private. Again the average of ten times three years' earnings to come up with an evaluation for the company.

Q Were there any other assets?

A Yes. A number of these I got out of a prospectus in the December '69 --

Q Is that A-12?

A Yes, A-12.

Q Can you, by reference to A-12, identify some other components or subsidiaries of Pennsylvania Company?

A Yes. I used the DT & I Railroad, which --

Q Is that the Detroit, Toledo and Ironton Company?

A Yes, excuse me. Again, this was a question of three years' earnings, a multiple of ten times the average of three years' earnings to establish a value for the company. And I took the valuation that was ascribed in the prospectus to the Philadelphia, Baltimore & Washington Railroad Company as well as the Wabash Railroad common and preferred. In the case of Wabash, that was a convertible. It was convertible into Norfolk & Western shares at some later date so that's the value I used for it.

Q Were there any other usable assets in Pennsylvania Company?

A I had taken -- there was an amount of cash mentioned in here as of June 30th. I used that cash as a usable asset.

Q Were there any other usable assets?

A Not that I can recall offhand.

Q I suggest to you Madison Square Garden.

A I'm sorry, Madison Square Garden. That's the last one I should forget. Yes, that was a New York Stock Exchange.

Q Do you recall what the cushion or value of the usable assets after deduction of debt was in or about March 1970, prior to March 16th?

A I don't, without referring to the actual --

I know it was substantially in excess of all those numbers.

MR. STITT: Could you repeat that witness' answer, Mr. Reporter?

(Answer read.)

THE COURT: All what numbers?

THE WITNESS: The compilation, your Honor, of all of the assets I was using in terms of usable assets to support financing, etcetera. That agreegate figure was substantially in excess of the debt in those two companies and what I thought to be their upcoming financing requirements.

Q Mr. Vogel, during the time that Goldman, Sachs was handling the commercial paper of Penn Central up to at least March 16, 1970, did Goldman, Sachs turn down any potential issuer of commercial paper or stop offering the paper of any existing issuer of commercial paper for credit reasons?

A Yes, we did.

Q Can you think of any examples in that category?

A One fairly prominent name comes to mind, General Dynamics. They were having a lot of problems at that time with their F-11 fighter plane -- fighter bomber, I should say, and also they had some tremendous write-offs in their shipbuilding program and we just felt that the combination of these two -- we -- I felt that the combination of these two, there was more risk in the situation than I thought belonged in the commercial paper market.

THE COURT: When was this?

THE WITNESS: This was some time in '68 or '69, I don't remember the exact time.

Q Can you think of another?

A Another one, Diner's Club, the credit card company. As I remember there, they had -- they were having a lot of problems with their internal controls in terms of delinquencies. They had some -- I believe they were partially owned at that time by a major insurance company which had told us that they weren't going to invest any more money in it and they had some -- they really weren't able to control how much people were putting on their cards in terms of any financing requirements.

So we just felt at that point that until that situation was resolved, that we didn't think they should be selling paper. This Diner's Club was selling paper to us and we suspended sales.

Q Can you think of any examples of companies that had other relationships with Goldman, Sachs?

A One that painedme as an individual greatly was the General Cigar, which had been our oldest investment banking relationship and Mr. Weinberg was on the board.

Q Which Weinberg is this now?

A Sidney Weinberg. He has passed away. He was senior partner and I just was sorry to have to say no to a company that he was that close to. I remember there was a one sort of unique case. It was not a very big company. It was a small finance company, American Acceptance Corp., which had a large debt equity, a lot of debt to the net worth of the company and we felt -- I felt that this was an appropriate number so long as they had recourse arrangements to major manufacturers and they were financing the wholesalers of those products and one day I picked up the paper and there was a suit by one of these major manufacturers against the company, contesting the validity of that recourse arrangement and I felt that so long as this was a problem I didn't think they should be in the paper market.

Q Mr. Vogel, have you ever recommended that an issuer or potential issuer be not taken on for credit reasons or not continued for credit reasons and overruled?

A No, sir, not a bit.

Q Mr. Vogel, do you remember testifying under oath in a deposition which took place in 1972 in this action?

MR. STITT: Page, please?

A Would you repeat that, please?

Q Do you recall testifying in a deposition in 1972 in this action?

A Yes.

Q Do you recall being asked questions by the liaison counsel for all the plaintiffs in that deposition?

A Yes.

Q Do you also recall giving testimony before the Securities & Exchange Commission in relation to the Penn Central Company?

A Yes, I do.

Q Do you recall testifying last fall in a trial in this courthouse with relation to Penn Central?

A Yes, I do.

Q Did you, prior to giving testimony before the SEC or on your deposition, perform a careful review of the credit file, Exhibit A?

A No, I did not.

Q Did you at the time that you testified before the SEC or on your deposition, have the credit file in front of you?

A Oh, I think I saw -- no, I did not have the credit file, but I saw -- pieces were handed to me to look at.

Q What kind of pieces were shown from the credit file to you?

A The blue sheets.

Q Were you shown the blue sheets altogether?

A No. It was isolated documents.

Q Did you, prior to the trial of this action, review the credit file on Penn Central?

A Yes, I did.

Q More than once?

A Extensively in the past few months.

Q Did your review of the credit file prior to this trial refresh your recollection as to events?

A Yes, it did. A lot I still don't remember, though.

MR. MANEY: Your witness.

CROSS-EXAMINATION

BY MR. STITT:

Q Mr. Vogel, you are not the operating head of the credit department, are you?

A I was the credit manager.

Q Isn't it true that Mr. Fekula was the operating head of the credit department?

A Mr. Fekula was on the premises and he was an on-the-premises adviser to the other people.

THE COURT: I don't understand.

THE WITNESS: He was physically there and he was a senior as opposed --

THE COURT: I am not worried about physically there. I said this before. I don't care where you sit. Who was the operating head of the credit department?

Q In 1968, '69, and '70.

A I was the credit manager. Mr. Fekula handled in the credit department the day-by-day operations. He supervised the day-by-day operations and if that's a title, that's what he was.

THE COURT: You are then saying he was not the operating head?

THE WITNESS: We didn't have a designation per se.

THE COURT: Who was the boss?

THE WITNESS: He was the boss up in the credit department.

THE COURT: He was the boss?

THE WITNESS: Right.

THE COURT: That means he was over you?

THE WITNESS: No, I was over him. He reported to me.

THE COURT: All right.

Q So the record will be clear, were you asked these questions and did you give these answers on Page 17 of your examination before trial?

"Question: Who was the operating head of the credit department in 1968, '69, and '70?

"Answer: Walter Fekula.

"Question: What were his duties as operating head of the credit department?

"Answer: An on-the-scene supervision of the activities of the credit analysts."

Did you give those answers to those questions?

A I am certain I did.

Q I show you a copy of Exhibit F59 for identification and I will ask you if you can tell us what that is, please.

A This is a memorandum written to Robert G. Wilson from Walter Fekula.

Q Did you receive a copy of that memorandum, and I direct your attention to the last page down at the left-hand corner.

A It clearly indicates I received a copy and I had received a copy.

Q In the usual course of business of Goldman, Sachs?

A Oh, yes.

Q On or about the date indicated?

A I am certain of that, yes.

MR. STITT: I offer that, your Honor.

MR. MANEY: I object, your Honor.

THE COURT: On what grounds?

MR. MANEY: This was an exhibit which was previously offered and the objection was sustained, dated June 1968.

MR. STITT: The objection, your Honor, as I recall, was that Mr. Fekula was some sort of underling who wasn't qualified to put out a memorandum of this sort. He has now been established as operating head of the credit department at this time.

THE COURT: No, he hasn't been established as anything more than a fellow who supervised the day-to-day activity of the analysts.

MR. STITT: Yes, sir.

THE COURT: That doesn't make him the operationg head with a big sign on his door and a man of any responsibility.

MR. STITT: Your Honor, that's exactly what this witness has just testified to.

THE COURT: I read that and it doesn't mean anything to me. It doesn't sustain what you claim it means. They give titles around these organizations like crazy.

This man is the boss of the department.

Q And Mr. Fekula is the number two man?

A He reported to me.

Q And how long had he been in the department as of 1968?

THE COURT: That isn't the objection. I gather the objection is date, is it not?

MR. MANEY: Yes, your Honor.

MR. STITT: Your Honor, the signifance of this is in particular the statements at Page 4 by Mr. Fekula concerning the criteria in connection with the preparation of green sheets and the green sheet of February 18, 1970, Exhibit 84, is one of the crucial documents in this case.

THE COURT: Why don't you ask this witness as to the information you want from this document and its existence back in February. That's the way to do it.

MR. STITT: All right.

Q Are you familiar with a green sheet put out by the department?

A The department put out green sheets, yes, sir.

Q And this would be information that would be sent to investors by mail?

A Mail or otherwise.

Q And were there certain criteria in determining whether a green sheet should be put out?

A No special criteria.

Q This is a green sheet that would go out between annual reports?

A That's correct.

Q I ask you if the criteria in determining whether a green sheet should be put out included materiality and disclosure.

A It included the criteria for putting out green sheets for example with a finance company. Since we got six month balance sheets we would automatically as criteria put out the six month balance sheets. As far as I was concerned I had not known that we had "any criteria for disclosure."

Q I direct your attention to this paragraph at Page 4 of Mr. Fekula's memo of June 6, 1968.

MR. MANEY: Objection, your Honor, to reading a document not in evidence.

THE COURT: He can point it out to see if he knows about it.

MR. MANEY: Yes, your Honor. I object to his reading the document out loud.

THE COURT: I don't care if he reads it. If he reads it or gives it to the witness to read, what difference does it mean?

Q "The criteria in determining if a green sheet should be put out are: Materiality and disclosure, whether there is inventory on the name, and to a lesser extent whether or not the information can assist in selling the name."

Do you agree with that statement?

A I think by and large I would agree with some of it, yes.

THE COURT: What does that mean?

THE WITNESS: Well, all I am saying --

Q What do you disagree with concerning that statement?

A Because I don't know what the definition of materiality and disclosure is.

If you tell me what that is I will agree with it. I don't know. There is no definition there.

Q You have no idea what Mr. Fekula was referring to by the terms materiality and disclosure in his memorandum of which you received a copy in June '68?

A That's correct, sir.

Q Now, you testified this morning concerning the credit file which is Exhibit A inclusive, if I may use that term, is that correct?

A This is Exhibit A, according to the --

Q This document about four inches thick, would you say --

A I would go along with your judgment of the size.

Q Do you have any recollection of having asked for that credit file during the year 1968?

A Specially asked for it?

Q Yes, sir.

A I don't recall.

Q Or in 1969?

A I don't recall.

Q Or in 1970?

A I don't recall.

Q Was there any event in Penn Central in 1968, 1969, or 1970 which caused you to ask for the credit file on Penn Central?

A I don't recall asking for the credit file.

Q Have you any recollection of how often you reviewed the credit file on Penn Central?

A Normally in relation to -- it was my normal practice to review it certainly in connection with any annual review that was sent to me, in connection with any material throughout the year that was sent to me, in connection with events or circumstances where I thought I needed the credit file.

Q To supplement your testimony I ask you if you were asked these questions and gave these answers, at Page 188 --

MR. MANEY: Objection.

THE COURT: Sustained.

I told you I don't take in supplementing testimony that way.

Q I ask you if you were asked these questions and gave these answers at Page 188 of your examination before trial:

"Question: Do you have any recollection of how often you reviewed the credit file in Penn Central?

"Answer: We had an ongoing investigation of all issuers. To the extent that some time during the year something came to my attention that I would want to review in the context with the file I would ask for the file. I have no specific recollection of this -- of any particular issuer."

"Question: Do you have any recollection of having asked for the Penn Central file at the time in 1968, 1969, or 1970?

"Answer; I have no specific recollection.

"Question: Was there any event in Penn Central in 1968, 1969, or 1970 which caused you to ask for the credit file on Penn Central?

"Answer; I don't recall having asked for the credit file."

Were you asked those questions and did you give those answers?

A I am certain. You have the transcript.

THE COURT: It is completely consistent with the witness' testimony, so why waste time reading it a second time?

Q Now, was Michael Evans a credit analyst within your department during the years 1968 and 1969?

A Yes, sir.

Q And during those years was he the analyst who was assigned to Penn Central?

A Yes, sir.

THE COURT: What's his name?

MR. STITT: Michael Evans.

Q And is it true that you never asked Evans to update his credit investigation?

A To update his credit investigation?

Q Yes, sir.

A Michael Evans did update his credit investigation.

Q The question was, did you ever ask him to update it?

A I had many conversations with Michael Evans. I don't specifically recall asking him to update it.

Q At Page 256 of your testimony in the Welch trial this past fall were you asked these questions and did you give these answers:

"Question: Michael Evans was the credit analyst assigned responsibility for following Penn Central in 1968 and 1969, is that correct?

"Answer: I believe so, yes.

"Question: You never asked Evans to update the credit investigation on Penn Central, did you?

"Michael Evans" --

"The Court: No. Yes or no? You asked him or you didn't ask him.

"Answer: I don't recollect."

Did you give those answers to those questions?

A Yes, sir, if you have the transcript.

Q And at Page 188 of your deposition where you were asked:

"Question: Did you ever ask Evans to update his credit investigation on the basis of any development in Penn Central?

"Answer: I don't recall having done that."

Were you asked that question and did you give that answer?

A Yes, sir.

THE COURT: Is that inconsistent with his statements here from the stand?

Q Now, was there a --

THE COURT: Look, Mr. Stitt, I am trying to bring to your attention you are prolonging this cross-examination unnecessarily as you did with other witnesses. You start off by reading from the deposition of the trial testimony and the witness gives you answers. You then read them a second time, this time indicating for the record that you are reading them and they turn out to have the very same answers that he gave you the first time.

Q Mr. Fekula, was Robert Hoffman the credit analyst assigned to handle Penn Central in 1970?

MR. MANEY: Is that Mr. Vogel?

Q Mr. Vogel, was Robert Hoffman the credit analyst who was assigned to handle Penn Central in 1970?

A Yes, sir, he was.

Q And did you ever ask Hoffman to update his credit investigation?

A Yes, I did.

Q At Page 169 of your deposition were you asked this question and did you give this answer:

"Question: Did you ever ask Hoffman to update his credit investigation of Penn Central on the basis of any development in Penn Central?

"Answer: I don't recall having asked Hoffman that question."

Did you give that answer to that question?

A If you have it there, sir, I gave it.

Q And isn't it true that you never updated the credit investigation of Penn Central?

A That's totally untrue.

Q Do you recall any specific event which occurred in 1968, 1969, or 1970 involving Penn Central which caused you to update your credit investigation?

A There were a number of meetings that I had to be prepared for. It is my normal and has been and will always be, practice to update myself on those particular companies at the date of those meetings.

Q Do you recall any specific event was the question I put to you.

A I don't recall specifics. I am giving you my normal practice.

Q I take it you don't recall any specific event? Is that your testimony?

A Yes, sir.

Q Now, I believe you testified that you did about 90 percent of the initial credit investigation effort?

A Yes, sir.

Q I ask you whether any written analysis was made in connection with the initial credit investigation?

A Are you through with the question?

Q Yes.

A Not to my knowledge.

Q Not by you?

A Not by me.

Q And not by anyone else?

A That's correct.

Q You didn't prepare any paper in connection with that initial investigation?

A I don't know what you mean by prepare a paper.

THE COURT: Did you make a report on your investigation?

THE WITNESS: Yes, I made an oral report.

THE COURT: An oral report?

Q But no written report?

A No written report, that's correct.

Q You didn't prepare or create any paper in connection with your initial investigation?

MR. MANEY: Objection. Asked and answered, your

Honor.

THE COURT: Overruled. It is cross-examination.

Q Will you answer the question?

A I don't understand what you are asking me.

MR. STITT: Would you repeat the question to the witness, please?

(Question read.)

A I did not write a written analysis in connection with my initial investigation. I don't know what you mean by creating a paper.

Q Any written document.

A I have got the same problem, Mr. Stitt, with that one.

What is a written document?

Q Were you asked this question by the Court at Page 2059 and did you give this answer at that page of the Welch trial:

"The Court: I think what counsel is asking you is, did you prepare or create any paper in connection with your initial investigation?

"The Witness: The answer to that is no."

Did you give that answer tothat question?

A I think I already told you I did not prepare a written paper in connection with the initial investigation.

Q Now, you gave testimony concerning a Mr. Kealy and two memoranda which he prepared in 1968, I think one dated May 13, 1968 and the other dated June 11, 1968, Exhibits A-109 and 111. Do you recall that testimony?

A Would you repeat it, please?

MR. STITT: Could you repeat the question to the witness?

(Question read.)

A At which time are we talking about? I think I testified to those today.

Q Yes. That's what I meant to ask you. This morning.

A Yes, sir.

Q I ask you, isn't it true that these memoranda were not prepared as part of the initial credit investigation?

A By Mr. Kealy?

Q Yes.

A That's correct.

Q As a matter of fact, Mr. Kealy played no part in the initial credit investigation?

A Not directly, no.

Q And he played no role in the ongoing credit investigation?

A Not to my knowledge.

Q And isn't it true that you never discussed with Mr. Kealy either of these memoranda?

A No, I did not.

Q And is it also true that you asked no questions of any Penn Central officers about any material that you may have examined?

A I didn't hear the last part of that.

Q Did you ask any questions of any officers of Penn Central about the written materials you examined in doing the initial credit investigation of Penn Central?

A I don't remember specifically asking anyone questions.

Q You don't recall having any contact with the officers at that time, do you?

A I don't recall.

Q Now, I would like to ask you just a couple of questions about access to that file before you, Exhibit A inclusive.

Is there a policy limiting or restricting access to the credit files at Goldman, Sachs?

A Yes, there is.

Q Do you know the reasons for that limitation?

A The reason?

Q Yes.

A I know certain individuals were not allowed to see the file, particularly institutional salesmen and I presume the reason was that the files contained sensitive information that they weren't capable of evaluating.

Q At Page 2263 of your Welch testimony, were you asked these questions:

"Question: Mr. Vogel, is there a policy of limited or restricted access to the credit files of Goldman, Sachs?

"Answer: Yes."

There was an objection which was overruled.

"Question: Mr. Vogel, isn't it a fact that you did not know the reason for that policy?

"Answer: The policy was set down before I got to Goldman, Sachs. I know the policy. The reason behind it I do not know."

Did you give those answers to those questions?

A I am certain I did.

Q Isn't it true that you have given information in the blue sheets to commercial paper salesmen?

THE COURT: To what?

Q Isn't it true that you have given information from the blue sheets in the credit file to commercial paper salesmen of Goldman, Sachs?

A That I have given information?

Q Yes.

A From time to time, yes, sir.

Q And from time to time you gave the commercial paper salesmen non-public information from those blue sheets, isn't that so?

A You would have to define what you mean by non-public information.

Q Well, were you asked this question and did you give this answer, beginning at 2263 of your Welch testimony:

"Question: You occasionally gave the commercial paper salesmen non-public information from the blue sheets, isn't that so?

"Answer; From time to time, yes."

Did you give that answer to that question?

A You have the record.

Q I am going to place before you Exhibit F-60 in evidence and I am going to draw your attention to the salesmen listed on the chart in the New York office and I will ask you to identify those salesmen in that box to whom you have given, first, information from the blue sheets and, second, non-public information from the blue sheets.

MR. MANEY: Objection, your Honor. It is totally irrelevant on the basis of Mr. Bock's testimony.

THE COURT: Sustained.

MR. STITT: Well, your Honor, I believe there was testimony from the defendants that this information was kept apart from the salesmen and for that reason it was some sort of defense or mitigating circumstance in this action.

Now, of course, I disagree with any legal argument based on that, but I would think having been confronted with that contention that I might be permitted to pursue this.

THE COURT: He has already admitted that he has from time to time given some information that appears in blue sheets to salesmen. Now, what more do you need?

MR. STITT: Thank you, your Honor.

Q Now, you testified this morning about bank lines. Mr. Vogel, in making a judgment on the credit-worthiness of an issuer, bank lines are important, are they not?

A Yes, sir.

Q And you have also checked the bank lines of an issuer in your credit investigation, do you not?

A When you say you, collectively, yes, we have.

Q Either you personally or someone under your supervision?

A Yes.

Q I believe you were asked one question at least about reports prepared by brokers. Isn't it true that you do not use broker's reports as part of your credit investigation?

A When you say do not use, I read them and to the extent they give me background material that would be interesting, I use them in that sense. They are not embodied in my own particular credit evaluation.

Q Well, were you asked this question at Page 205 of your deposition:

"Question: Did you read any broker-dealer reports on Penn Central as part of your continuing credit investigation of Penn Central?

"Answer: I don't recall any specific instance.

Did you give that testimony?

A You have the record, sir, I certainly did.

Q You mentioned certain assets of Penn Central and I believe you mentioned that some of those assets were pledged, is that true, generally?

A Yes, sir.

Q Isn't it true, Mr. Vogel, that by the end of 1969 you knew that substantial portions of the assets of Penn Central were pledged?

A That I knew?

Q Yes, sir.

A Yes, sir.

Q You knew, for example, that all of the stock of the Pennsylvania Company was pledged, isn't that so?

A Yes, sir.

Q That was done in December of 1969? That was done in December of 19 --

A What was done?

Q The pledging of the Pennsylvania Company stock?

A No. That was done earlier in the year in connection with the revolving credit.

Q I see. That was back as of April 1 when that was done, and you knew that fact, didn't you?

A Yes, I did.

Q And you knew that the Pittsburgh & Lake Erie Railroad stock had been pledged, hadn't it?

A A portion, yes, sir.

Q And you knew in 1969 that the Detroit, Toledo & Ironton stock had been pledged, isn't that so?

A If it had, I knew it.

Q Well, could you refresh your recollection by consulting the $50,000,000 Pennsylvania Company debenture prospectus of which I believe you testified on direct examination?

A Yes. It was pledged in whole or in part under the company's indentures. This is a footnote on Page 7 -- That's the December 7, 1969 --

A The $50,000,000 debenture issue by Pennsylvania.

Q December '69?

A Yes, sir.

Q And that's when you came by that information?

A Yes, sir. It might have been sooner. That just footnotes it.

Q You knew by the end of 1969 that the stock of all of those companies was substantially or completely pledged?

A All of which companies?

Q Those that I have just mentioned, the Pennsylvania Company, Detroit, Toledo & Ironton, Pittsburgh & Lake Erie.

A I had not known that substantially all of the stock of Pittsburgh & Lake Erie was pledged. A portion of it was.

Q But you knew of the pledge of Pittsburgh & Lake Erie and Detroit, Toledo & Ironton, you knew that by the end of 1969?

A Yes, sir.

Q And you also knew that all of the stock of the Buckeye Pipeline Company had been pledged in the summer of 1969, isn't that so?

A Yes, sir.

Q And you also knew that the stock of the Norfolk & Western Railway was pledged in 1969, isn't that true?

A In one form or another, yes, sir.

THE COURT: All of it?

THE WITNESS: I don't remember exactly the number of shares. I think most of it was.

Q And you also knew that the preferred stock of the Wabash Railroad was pledged, isn't that so?

A I don't recall.

Q Well, would you refresh your recollection by referring again to that December indenture document to which you referred earlier?

MR. PIEL: Which page, Mr. Stitt?

Q Can you find that, Mr. Vogel?

A It indicates that the preferred stock of Wabash Railroad was pledged in whole -- the preferred stock was pledged in whole or in part as collateral for the company's indentures. It does not suggest how much.

Q As a matter of fact, Mr. Vogel, by the end of 1969 substantially all investments in properties in the consolidated balance sheet and substantially all of the properties of the Pennsylvania Transportation Company, together with certain of its investments, had been pledged as security for loans or otherwise restricted under indentures and loan agreements, isn't that so?

A I would not disagree with it. I don't know what the term substantial means in this case. There was a number of properties that were not pledged, like, for example, Arvida and Great Southwest and so forth. A great deal of real estate to my knowledge, was not pledged.

Q Do you have, and may I place before the witness so he may have it for this question, a white sheet dated April 14, 1970?

A I believe it's been designated A-28, Plaintiff's Exhibit 38, and Defendants' Exhibit 37 in various matters.

MR. MANEY: What's the F exhibit?

MR. STITT: It's not an F exhibit. I believe it's A-28.

MR. MANEY: For identification?

MR. STITT: Yes. I am not offering it. I just want the witness to have it before him in answering this question.

THE COURT: Where is it?

MR. MANEY: I believe, your Honor, it would be located in Exhibit A.

THE COURT: Do you have Exhibit A?

THE WITNESS: This is it?

MR. STITT: The white April 1970.

MR. MANEY: It was not a part of the Exhibit A which was offered.

THE COURT: Do you have it?

THE WITNESS: Yes, sir.

THE COURT: What's your question, Mr. Stitt?

Q With that document before you, I ask you, Mr. Vogel, whether that document refreshes your recollection that substantially all investments and properties in the consolidated balance sheet and substantially all the properties of Penn Central Transportation Company, together with certain of its investments, had been pledged as security for loans or otherwise restricted under indentures and loan agreements?

I call your attention to Page 7 of that document.

A Yes. There is a footnote to that effect.

Q Thank you.

Now, you were asked questions on direct examination concerning the Interstate Commerce Commission, were you not?

A I don't recall specific questions.

Q Do you recall Mr. Maney placing before you Exhibit F-489, or a copy thereof, Mr. Wilson's letter to

Mr. Bevans of March 11, 1969?

A Yes, I remember this.

Q I also show you, so I can combine it in one question, Exhibit F-51, which is a letter to Mr. Bock of the ICC from Penn Central Transportation Company, dated October 1, 1969.

Now, do I understand your testimony to be that the credit department did nothing to investigate -- to update its credit investigation at the time Goldman, Sachs rendered any such opinion to Penn Central for use by Penn Central before the ICC in 1969, either in March or in the fall?

MR. MANEY: Objection, your Honor. It is compound. It is dealing with two separate dates.

THE COURT: I don't understand this. I have before me F-49. Now, what's your question regarding F-49?

Q With regard to F-49, were you asked or was your department asked to update your credit investigation in connection with the giving of that letter by Mr. Wilson?

A I don't recall specifically.

Q I am going to direct your attention to Page 3 of the ICC letter of -- there is a Penn Central letter to Mr. Bock of October 1, 1969, and I direct your attention to the reference to Goldman, Sachs in numbered paragraph 2 at Page 3, and ask you whether you were consulted by Mr. Wilson with respect to any opinion which he may have given for use by Penn Central before the ICC at that time?

MR. MANEY: Objection, your Honor. It is referring to a hearsay statement in a document. It is contributing something to Goldman, Sachs without a predicate.

THE COURT: I have no document in front of me so I don't know what's being talked about.

MR. STITT: This is Exhibit 51, your Honor, page 3.

THE COURT: I don't have it.

Now, what page are you referring to?

MR. STITT: Page 3, numbered paragraph 2.

THE COURT: I sustain the objection.

MR. STITT: Let me ask the witness this question:

Q Were you consulted with respect to any opinion rendered by Mr. Wilson to Penn Central for use by Penn Central before the ICC?

A Did you want me to respond to that?

THE COURT: Yes.

A I don't recall specifically.

Q Was anyone else in your department so consulted by Mr. Wilson?

A Not to my knowledge. There may have been.

Q But you have no knowledge?

A No.

Q Now, was it your understanding that the money which the railroad was going to obtain from its commercial paper sales or from the commercial paper sales would be used for working capital purposes, that is to replenish working capital?

A General working capital purposes, yes, sir.

Q Did you ever ask Penn Central how it planned to use the proceeds of the sales of its commercial paper?

A Not specifically, no.

Q Did anyone else in the credit department do so to your knowledge?

A I don't understand the thrust of the question, but not to my knowledge.

Q Neither you nor anyone else in your department?

THE COURT: He said not to his knowledge. He didn't.

Q Isn't it true that you do not know of your own knowledge what use of the proceeds Penn Central planned?

A To my knowledge the use of those proceeds were intended for general working capital purposes. Money is fungible. . It can go into 15 directions at once. I did not specifically ask or get a response it was going to be buying coal or oil or milk or lunchroom or pay off salaries.

I did not ask.

Q And to your knowledge no one else in the credit department asked?

MR. MANEY: Objection, your Honor. Asked and answered.

THE COURT: Sustained.

Q Mr. Vogel, I call your attention to an ICC report with the service date of November 6, 1969. This is Exhibit F-48 in evidence, and also a covering letter from Mr. Loder to Mr. Wilson, enclosing that document, Exhibit F-50, dated November 7, 1969.

I ask you did you ever read Exhibit F-48, the ICC report, at any time prior to March 16, 1970?

A May I glance through it before I answer?

Q Oh, please.

MR. MANEY: Your Honor, may we establish or maybe Mr. Stitt can stipulate, but the document which is F-48 was not necessarily transmitted under cover of F-50 in the printed form --

THE COURT: We are not up to that point yet. He is merely asking a question as to whether this witness read F-48 before March 16th. That's a simple question. Yes or no.

MR. MANEY: Objection, your Honor. Is F-48 reprinted from --

THE COURT: He is being asked whether he read this report. He is now looking at it to see if he read it.

MR. MANEY: I was merely trying to establish, your Honor, that it may not have been in the printed form.

THE COURT: What difference does it make? He obviously knows he is being inquired as to substance, not as to this particular piece of paper.

A Yes, I did read this report prior to the date you gave.

Q I ask you if at Page 221 of your examination before trial on March 9, 1972, you were asked this question and gave this answer:

"Question: I show you P-64"-- which I now represent is 48 -- "which is the report of the ICC dated or served on November 6, 1969, and ask you whether you read that report at or about the date it began?

"Answer: I don't recall having read this."

Did you give that answer to that question?

A I am certain I did.

Q Is it your testimony that you read it some time thereafter?

A Upon further reflection, yes, sir.

Q And when did you read it?

A I am sure --

Q Upon further reflection.

A Upon further reflection I am testifying that I read the document.

Q Yes.

A I am not saying after a period. It was shortly after we received it.

Q So your testimony now is that you did read the report in or about mid or late November 1969?

A Yes, sir.

Q Mr. Vogel, I am going to call your attention to Page 4 of Exhibit F-48 and I am going to draw your attention to the same two paragraphs which have been previously brought to the attention of Mr. Bock and maybe another witness, first beginning with the word "applicant," and then the second paragraph beginning, "On the whole."

Would you read those two paragraphs, please?

A "Applicant feels" --

Q No, just read them to yourself. I'm sorry, I don't mean to shut you off, but I thought we might save your voice to that extent.

A I have read the passages.

Q I am going to ask you whether the portions of that report which begins "The exhaustion of short-term credit to refinance maturing long-term debt or to finance long-term capital improvements could expose a carrier to a serious crisis in the event of an economic squeeze at which time a carrier may require short-term financing for traditional use. We are therefore concerned about the use of short-term financing for long-term purposes and feel that where necessary it should be resorted to cautiously."

I ask you again if that provision of the report came to your attention first in November of 1969, or was it at some later period?

A It was in the report in November of 1969 when I received it and it came to my attention at that point. I read the report.

Q In answer to this question at Page 225 of your examination before trial, did you give this answer:

"Question: Did you read that statement of the ICC at any time?

"Answer: If my recollection is correct, there was a comment to that effect in one of the reviews that were written --I believe it was Hoffman's in which it said among other things, "On the whole, applicant is in a strong financial position" and then went on to some other details."

"Question: Did you see that statement that I read to you by the ICC at any time prior to the time that you read it in the Hoffman report?

"Answer: I don't recall offhand."

Did you give those answers to those questions?

A I am certain I did.

Q And the Hoffman report to which we have referred is this document F-24 bearing a date of May 9, 1970, and I draw your attention to Page 5.

MR. MANEY: Is that F-24 for identification, Mr. Stitt?

MR. STITT: F-24 for identification, yes, sir.

A Are you asking me a question at this point?

Q Yes, sir. Is that the Hoffman report to which you referred in that answer?

A Yes, sir, it is.

THE COURT: You know, you have referred to this Page 4 of this report of the Interstate Commerce Commission decided on October 29, 1969 and I assume issued November 6, 1969. I don't know what you are trying to get out of it.

MR. STITT: I am trying to demonstrate in this case, your Honor, that Goldman, Sachs was on notice -- it is not clear whether the right persons knew about it were in Goldman, Sachs -- that Penn Central was using its commercial paper for long-term financing as opposed to the traditional use of such paper for current working capital purposes and this was the subject of questions that your Honor will recall that I put to Mr. Bock and I think also to Mr. Van Cleave.

THE COURT: I know, but you also stop at the end of the second paragraph and never go into the third paragraph.

MR. STITT: Well, your Honor, I read both paragraphs at the request of Mr. Piel and Mr. Bock. I would certainly draw the witness' attention to the third paragraph.

THE COURT: I am not asking to have his attention drawn to it. As I sit here I can read it, and I have read it several times now during the course of the trial, and I find that while the Interstate Commerce Commission doesn't particularly like this being done, it says that the applicant is in a strong financial condition.

MR. STITT: It does say that, your Honor.

THE COURT: And they permit it to be done.

Now, if the ICC finds that the applicant is in a strong financial position and allows it to be done, it would seem to me, at least in that area, that's the end of the ball game.

MR. STITT: No, your Honor, I don't believe it is the end of the ball game.

THE COURT: In that area. There are other issues in this case, but this one leaves me cold and I think I indicated that when you had Bock on the stand.

MR. STITT: Your Honor, I believe this is one -- at the very least this is one additional warning to these defendants, at the very least.

THE COURT: But the ICC said it was good.

The ICC said they were in a strong financial position.

MR. STITT: The very fact that the ICC felt compelled to make that statement should have been a warning to these defendants.

THE COURT: Should have been a warning to Goldman, Sachs not to sell the paper?

MR. STITT: At the very least it should have been a warning to them that they had better look into this railroad a little more deeply.

THE COURT: After the ICC said they are in a strong financial position?

MR. STITT: In view of that fact.

THE COURT: I disagree with you. Let's go on. I think I indicated the other day this is not in this case as far as I am concerned.

If this was so terrible, the ICC shouldn't have permitted it.

BY MR. STITT:

Q Mr. Vogel, you testified that you read all of theblue sheets, and I believe that referred to '68, '69, and '70.

A I am certain, yes, sir.

Q And you got these as a matter of course at or about the time they were all written?

A Yes, sir.

Q I am going to direct your attention to F-26 in evidence, a memorandum from Mr. Morris, a salesman, to Mr. Wilson and Mr. Van Cleave, which states, "The Continental Insurance Company informed me today that they have dropped the Penn Central Company from their approved list. They told me that the article in the New York Times business section approximately three Sundays ago influenced their decision. It was a negative article and according to their interpretation the outlook for the company is not as sound as they thought when they first analyzed the company's financial condition.

"Accordingly, and in view of the fact that there are alternative companies whose notes are available in the open market, they decided that at the present time they would not purchase the notes of Penn Central."

I ask you what steps, if any, you took upon having that news brought to your attention?

A I don't recall having read this specific document.

MR. MANEY: May we ask counsel if he will stipulate that the original of this document is white, not blue?

MR. STITT: I have never seen the original of this, your Honor, I just have the xerox.

MR. MANEY: Page A-22 in Exhibit A.

Q I take it your testimony is you have no recollection of having been made aware of this fact?

A That's correct.

Q So, therefore, you did not take any steps as a result of it?

A I don't know what the thrust of your question is. In my ongoing credit investigation I was taking steps all the time.

Q But you never took any steps in relation to this decision by Continental Insurance?

A I don't recall anything specifically in connection with that.

THE COURT: What steps did you want him to take?

Q Did you call Continental to inquire about their reasoning?

A No, I do not recall doing it.

Q And their analysis?

A No, I don't recall.

Q Now, in September 1969, I believe we are agreed on the date of September 11 -- this is Exhibit F-7 -- you attended a meeting with Mr. Wilson, Mr. O'Herron and Mr. Drypolcher.

A This is --

Q The meeting of --

A Do you have something to refresh my recollection?

Q Yes. Sure.

A Yes, I wrote this blue sheet.

Q Would you identify Mr. Drupolcher for us?

A He is a new name, I believe. He was a buyer of commercial paper.

Q He was at Goldman, Sachs?

A Yes.

Q Now, I draw your attention to Mr. O'Herron's statement. Incidentally, this memorandum represents your contemporaneous recollection of what occurred at that conference?

A That's correct.

Q I draw your attention to this statement: "John also pointed out" -- this is the last sentence --

"that the company will be in a very tight cash position in the first quarter of 1970 and asked if we could put out as much paper as possible in April or longer."

Did you ask Mr. O'Herron any questions concerning that statement?

A I don't recall any specific questions other than what's recorded in the blue sheets.

Q Now, you testified on direct examination that in your initial view and consideration of the Penn Central Companies, great things were expected of the merger?

A Yes.

Q And this was one of the favorable considerations that you viewed in analyzing the company?.

A It's background, certainly, yes.

Q I am going to draw your attention to this blue sheet of November 10, 1969. It is part of the same page as Exhibit F-20, your Honor, although I believe the exhibit only includes the first blue memorandum of October 22nd, but let me read this one.

November 10, 1969, by Mr. Wilson:

"In talking with John O'Herron, vice-president, this morning, about how fast we could put out the additional $50,000,000 Penn Central paper, I told him that the recent article in the New York Times financial page quoting their counsel, Mr. Cox, to the effect that Penn Central is having a very rough time with the merger, could be very harmful to the sale of their commercial paper. I advised him that they may want to be thinking about getting another $50,000,000 in standby lines."

Did that memorandum come to your attention at about that time?

A I am certain it did, yes, sir.

Q And did you make any inquiry of Mr. Cox or anyone else on his staff as to the nature of the difficulties that Penn Central was encountering?

A I do not recall asking Mr. Cox questions relative to that.

Q Well, in fact you did not make any such inquiry, isn't that true?

A Inquiry as to what, Mr. Stitt? As to the subject of this --

THE COURT: As to Mr. Cox' quotation in the New York Times.

THE WITNESS: No, I did not.

Q As reported to you by Mr. Wilson. The answer is no, you did not?

A No, I did not.

Q Now, did you make any inquiry as a result of those statements in the ICC report to which the Court and I brought to your attention, Exhibit F-48?

A An inquiry in what sense, sir?

Q Any inquiry.

A I really don't -- I read the documents, I saw that they were allowed to issue an additional 50,000,000 in commercial paper. I reviewed the documents. That was the inquiry.

Q And thatwas all you did?

A Yes, sir.

Q Now, you have testified concerning the developments which occurred on February 5, 1970, first of all your contact with Mr. Rogers of NCO who called you on that date, is that so?

A I remember discussions this morning along those lines, yes, sir.

Q And he called to express concern over the sharply reduced earnings whichhad been announced in the newspapers of that date? That's recorded in your memorandum?

A That's recorded in my memorandum, yes, sir.

Q And in additon youlearned on that date or shortly thereafter that Brown Brothers had removed Penn Central form its approved list for purchases of commercial paper?

A I don't recall specifically that item.

Q Did you make any inquiry of Brown Brothers as a result of the credit memoranda F-3 and F-4 or A-13?

A If you are talking about whether I made an inquiry of Brown Brothers --

Q Yes.

A --relating to that, I don't remember any inquiry.

Q Do you recall instructing anyone else to make an inquiry?

A No, I did not.

Q Now, you were also asked questions about Exhibit F-3 which is the memorandum of the meeting among Mr. Levy, Mr. Wilson, Mr. Bevan, Mr. O'Herron and Mr. Loder on February 6, 1970.

A Yes, sir.

Q I believe you testified on direct examination that this memorandum contained very important information?

A I think it was important information, yes, sir.

Q Now, I ask you, did you make any inquiry of Penn Central officials regarding what had been discussed at this recessed club luncheon on that date, February 6th?

A No, I did not.

Q I believe you testified that you made a cushion analysis, is that your term?

A Yes, sir.

Q And did you record this analysis in the blue sheets?

A No, I did not.

Q Do you have this analysis with you today?

A No, I do not.

Q Where is it?

A The cushion analysis that I did?

Q Yes.

A It's in a waste paper thrasher somewheres, I gather, not returned to the earth.

Q You placed your analysis in the waste paper basket?

A I don't know what you are referring to in terms of analysis. I am saying that I made calculations as I have outlined in the past in the last two or three hours I have made eyeball studies of earnings and so forth. I did not write "an analysis."

Q But this cushion study --

THE COURT: This is what?

Q May we use the term "cushion study" --

A Yes, that's fine.

THE COURT: What is that?

MR. STITT: Would you answer the question of the Court, Mr. Vogel?

THE WITNESS: Your Honor, I think we have talked about this earlier. This was my estimate of the usable assets either owned by the railroad directly or through its wholly-owned subsidiary.

THE COURT: That's what you testified at the conclusion of direct?

THE WITNESS: Yes, sir.

Q Now, is it your testimony that you threw away this cushion analysis?

A I threw away calculations that I made within the context of it.

THE COURT: Are you assuming he wrote out an analysis, Mr. Stitt?

MR. STITT: I am just trying to find out what happened to it.

THE COURT: Why don't you ask him. What happened to what? You are assuming the existence of a detailed analysis. He is saying, as I gather, he didn't make one.

Q Is that your testimony?

A I did not make a detailed analysis. I made calculations which I destroyed.

Q And did you give this particular cushion analysis or study --

THE COURT: You keep saying analysis or study. I gather whatever he said was oral; that there was nothing written down in the form of a report as we understand it.

Q You gave no such written report to anyone at Goldman, Sachs?

A No written report, no, sir.

Q Mr. Vogel, you testified that one of the things that impressed you about the Penn Central group were subsidiaries, non-railroad subsidiaries?

A Yes, sir.

Q Isn't it true that you did not review the financial condition of the subsidiaries of Penn Central other than the Pennsylvania Company?

A Review the financial condition?

Q Yes.

A I don't know what you mean by that. I looked at all the subsidiaries.

Q Did you make any analysis of the financial condition of the subsidiaries of Penn Central other than the Pennsylvania Company?

A Yes. I looked at, for example, Pittsburgh & Lake Erie at one time in connection with could they do a bond deal.

Q Well, at Page 228 of your examination before trial were you asked these questions and did you give these answers:

"Question: What did you do in terms of investigating the financial condition of the subsidiaries?

"Answer: We would review whatever information was available on the subsidiary and to come to our conclusion what, if anything, that added to the strength of the parent company.

"Question: What subsidiaries did you review?

"Answer: There are a lot of subsidiaries. I don't recall specifically which ones we reviewed.

"Question: Can you name any subsidiaries whose financial condition you reviewed?

"Answer: Pennsylvania Company."

Were you asked those questions and did you give those answers?

A I am certain, yes, sir.

Q And the detailed review that you made of the Pennsylvania Company was in December 1969, as a result of that prospectus, isn't that so?

A No, I made other reviews. We are talking about two other things. I think you are talking about a review of financial condition and I am talking about I made a review in terms of the investment Pennsylvania Company had in various subsidiaries and used those -- that review in terms of my cushion study.

Q I thought I understood your testimony to be that you got your best look at the Pennylsvania Company in December 1969?

A That's the most comprehensive document. It had a lot of material in it. You didn't have to go to 14 different sources.

Q You also testified on direct exmaination concerning the change of name to Penn Central Transportation Company effective October 1, 1969.

A Yes, sir.

Q I believe you used the word "confusing" in referring to that development?

A The --

MR MANEY: Objection, your Honor. I believe the testimony on direct was terminated at the Court's request.

Q Well, did you use that word, "confusing"?

A Yes, sir.

Q Now, prior to October 1st, Penn Central was the company issuing the paper, isn't that so?

A That's correct.

Q And this was the parent company, the uppermost parent of the consolidated companies?

MR. MANEY: Objection, your Honor. Outside the scope of direct.

THE COURT: Overruled.

Q Isn't that so?

A The Penn Central Company you are referring to was the owner of Pennsylvania Company and the railroad properties.

Q Yes, and as of August 1, 1969 that was the parent of the railroad operations, the Pennsylvania Company and the subsidiaries?

A That's right.

Q And as of October 1, 1969, the company issuing the paper was now Penn Central Transportation Company?

A Yes, but there is an interluding step in there if you would like --

Q Let me take it on in a couple of more steps.

A It was the same company with a name change, yes.

Q But it was no longer the overall parent? Up above it was a holding company called Penn Central Company?

A It was the over -- it continued to have the identical assets it had prior to the name change. There was another company that owned its stock. That was the holding company that was formed earlier in the year.

Q That was Penn Central Company?

A That's the name they gave it, yes, sir.

Q Now, I am going to draw your attention to this corporate structure diagram as of April 1, 1970, on Page 29 of the defendants' pretrial memorandum and we have Penn Central Company and then underneath that we have Penn Central Transportation Company with the railroad and the Pennsylvania Company and the subsidiaries, but we also have over at the left attached to Penn Central Company and not to the transportation company, Southwestern Oil & Refinery Company, Royal Petroleum Corp. and Penn Central International, do we not?

A That's what it indicates in the block, yes, sir.

MR. MANEY: Can we establish a date for that? your Honor?

THE COURT: April 1970.

MR. MANEY: Objection, your Honor. Irrelevant.

THE COURT: Unless it was changed.

Q I ask you, can you tell us whether those companies or the assets which they then represented as of April 1, 1970, were held by Penn Central Company as of October 1, 1969?

A I don't recall specifically when those companies were acquired by the parent company. I believe it was after that.

Q All right. But if they were acquired after, presumably they had to be acquired with certain moneys held by the parent company in its own till as opposed to the railroad company?

A Or a --

MR. MANEY: Objection, your Honor. It assumes facts not in evidence. It is contrary to evidence.

THE COURT: It is obvious, isn't it?

MR. MANEY: No, your Honor, not for cash. This was a stock-for-stock acquisition, these acquisitions.

A Also --

THE COURT: Penn Central Transportation Company issued its stock?

MR. MANEY: No, your Honor. Penn Central Company, the holding company, acquired other companies, Southwestern Oil & Refinery Company and Royal Petroleum on an exchange of stock for stock.

THE COURT: And therefore, those companies wouldn't be subject to the commercial paper issued by the Penn Central Transportation Company, would it?

THE WITNESS: That's correct.

Q And they wouldn't be a usable asset, would they?

A I did not use them.

Q But they wouldn't be a useable asset for a purchaser?

A I did not use them.

THE COURT: He said he didn't use them, Mr. Stitt.

Q Now, did you take any steps to ascertain that there had been no change of assets or no reshuffling of assets involving the issuing company as a result of this reorganization on or about October 1, 1969, and if so, would you give us the details?

A I don't know what you mean by reshuffling. We were aware --

THE COURT: He has already stated that the assets stayed the same and the name of the owner just changed. That's what he said.

THE WITNESS: Yes, sir.

Q What steps did you take to reassure yourself on that point?

A What steps? I had a name change document indicating the name of Penn Central Company is now Penn Central Transportation Company. I don't know what you are asking.

Q And this document did nothing further?

THE COURT: What else would you want him to do?

Q Well, did you make any inquiry of the company officials?

A I did not call the company other than record the name change, no, sir.

Q Or anyone else?

A Not to my knowledge, no, sir.

MR. STITT: If I may have a moment, your Honor?

(Pause.)

Q This name change document, was that a brief one-page announcement put out by Penn Central?

A I don't remember. I think it came into me.

MR. STITT: Nothing further of this witness, your Honor.

THE COURT: Do you have any redirect, Mr. Maney?

MR. MANEY: No, your Honor.

THE COURT: You are excused.

(Witness excused.)

THE COURT: May I see counsel at the bench, please?

(Discussion off the record at the bench.)

(Adjourned to 10:00 a.m., June 9, 1975.)

FRANKLIN SAVINGS BANK OF NEW YORK

vs. 71 Civ 882

GUSTAVE L. LEVY, et al

New York, June 9, 1975
10:00 a.m.

* * * *

Trial resumed.

* * * *

MR. PIEL: If your Honor please, Mr. Stitt has kindly produced the original note which has been marked F89-A for identification, and I am not offering it in evidence, but I would just like to exhibit it to the Court so that the record may note that the signature of Mr. Shaffer for the Penn Central Transportation Company was a machine-made facsimile signature.

THE COURT: All right.

MR. PIEL: If your Honor please, Mr. Stitt has kindly conceded the authenticity of our exhibit which we noticed in the pretrial order AZ for identification, being a document entitled "Penn Central Company, 1970 Financial Plan," under date of March 6, 1970, indicating that it originated from the Director of Budgetary Administration, and having been found in the same file as Plaintiff's

Exhibits 76, 77 and 78, which your Honor has admitted into evidence subject to connection.

Our point in objecting to those documents was, of course, that these were internal detailed displays for management purposes of a kind that one cannot assume could be available to outsiders, although some ultimate conclusion from it might be expressed to them orally.

AZ we submit to complete the picture, and if your Honor sustains our objection to 76, 77 and 78, then we would withdraw AZ.

I might just say, your Honor, that 76, 77 and 78 appear to be weekly revisions of the first-quarter's estimates, and the figures in the column on AZ which are under first quarter coincide with the figures on Exhibit 78. What this then does is to project for the three quarters and the total for the year.

THE COURT: It is admitted in evidence.

MR. PIEL: I call your Honor's attention to the fact that on February 6 at that conference, the railroad people told the Goldman, Sachs people that the estimated loss for the year, total net ordinary -- earnings lost for the company, that is to say, the Penn Central Transportation Company, would be $56 million, as it had been the year before, and that figure appears in the lower right-hand corner of AZ.

MR. STITT: I do object to Mr. Piel's testifying, your Honor. We have witnesses in the room, Mr. Levy and the gentleman next to him. I don't intend to --

THE COURT: He is not testifying, he is just arguing, which he can reserve for the end of the case.

MR. STITT: I consent to AZ going in evidence, your Honor, but I do not wish my silence to be construed as agreement with other remarks made by my adversary, most respectfully.

xxx (Defendants' Exhibit AZ was received in evidence.)

GUSTAVE L. LEVY,

called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PIEL:

Q Are you the senior partner of Goldman, Sachs & Company?

A Yes, sir, I am.

Q How long have you been senior partner?

A For about seven years.

Q You succeeded Mr. Sidney Weinberg --

A Yes.

Q -- upon his death?

A. Yes.

Q. When did you first go to work with Goldman, Sachs?

A. February of 1933.

Q. Forty-two years ago?

A. Yes, sir.

Q. I want you very briefly to trace your business career and experience, very briefly, at least until we get to Goldman, Sachs, but, first, what had been your education before you had your first job for a living?

A. I went to Tulane University as a freshman. However, in November of my freshman year, I had to leave college. I came to New York and started as a runner in Wall Street in November of 1927.

Q. Was New Orleans your hometown?

A. Yes.

Q. You grew up there?

A. Yes.

Q. What was your first job?

A. My first job was a runner at Newborg & Company.

Q. What was a runner?

A. A runner was and is a person who delivers paper and securities around the street and did odd jobs for the firm he works for.

Q If only as a matter of preinflation nostalgia, what was your starting pay?

A. $11 a week.

Q Did you say Newborg & Company?

A. Yes.

Q How long were you with them?

A. I was with them, as I recall, until sometime in 1930.

Q Was that a brokerage house?

A. Yes. After that I went to a firm called Pringle & Company for about a year. Then I heard about the job at Goldman, Sachs & Company, and then I went with them.

Q What did you do at Pringle & Company?

A. I was a bond trader and securities trader for Pringle & Company.

Q So that you began with Goldman, Sachs, then, in about --

A. February 1933, as I recall.

Q Did you resume studies at any point?

A. Yes, I started going to NYU night school in about 1928 and I went for about five years.

Q Was this night --

A. Yes, sir, night school.

Q What did you do when you started out with Goldman, Sachs?

A. I was hired as a foreign arbitrageur to deal in -- with counterparties in Europe, in foreign bonds, primarily.

Q Have you been with Goldman, Sachs ever since?

A. Yes, sir, with the exception of the time I was in the Army.

Q You served with the Army Air Corps in World War II.

A. Yes, sir.

Q Twenty-six months abroad.

A. Twenty-six months abroad and something over three years total --

Q You went in as a first lieutenant and came out a lieutenant colonel; is that right?

A. Yes, sir.

Q In addition to being senior partner of Goldman, Sachs, are you a director of a number of financial and industrial corporations?

A. Yes, I am.

Q I show you a piece of paper that we have marked Defendants' Exhibit FB for identification. This wasn't a pretrial order document, but I am proposing, your Honor, to save time in testimony by such a summary. This is a piece of paper, a memorandum, that your secretary furnished me at my request.

I ask you to look it over and I ask you if that isn't a correct list of your present directorships.

A. Yes, I believe it is.

Q. Have you in addition to being at the present time a director of those corporations, have you, from time to time, had directorships in other different corporations in the past?

A. Yes, sir.

Q. In order, among other things, to show the directorships in the period 1968 to 1970, I show you another document, FC for identification, and ask you if that is a correct list of your previous directorships.

A. Yes, sir.

MR. PIEL: In lieu of testimony on the subject, I offer these in evidence, your Honor.

MR. STITT: No objection by the plaintiff, your Honor.

xxx (Defendants' Exhibit FB was received in evidence.)

xxx (Defendants' Exhibit FC was received in evidence.)

Q Listed alphabetically the first one is the Bowery Savings Bank, of which you have been a director for some ten or eleven years.

Are you a member of any committees of the board of that institution?

A. Yes, sir.

Q What?

A. I am presently on the executive committee. The executive committee changes every six months -- six months or a year. You are on for six months or a year and you are off for six months or a year. It is my turn to be on now.

I am also a member of the investment committee ever since I have been a trustee of the Bowery.

Q In order that the Court is not led in to an impression that you are some kind of a movie star making one-night stands with name bands around the country, I would like to ask you how much of your working time you devote to the duties of these directorships.

A. It is hard to say. I would guess somewhere between twenty-five and thirty percent of my time.

Q How long is your working day?

A. I get up most every morning around 5:30 and I usually am downtown or at a directors' meeting uptown until 6:00 or 7:00. Two, three, four nights a week normally I go to business dinners or philanthropic dinners, to which business people ask me to go.

Q In the morning, what time do you get to your office?

A. 8:00 o'clock.

Q What have you done before then that relates to your business, if anything?

A. Part of my briefcase, I have read the Wall Street Journal and the New York Times.

Q How many days a week does this go on?

A. Every weekday and most weekends.

Q How often do the boards meet of which you are a member?

A. Some of them meet monthly and some of them meet quarterly.

Q Do you have any conflicts of meeting dates?

A. No, sir, I don't. When I did have conflicts, the boards were kind enough to adjust their schedules so I could attend.

Q What is your attendance record?

A. I think pretty good. I attend most of the meetings, except if I am on vacation or sick, or something like that.

Q How does it come about, please explain to the

Court, how does it come about that you, having come up in the investment banking business, as you have, are on the boards of so many corporations?

A. Well, it's been a tradition of my firm to be on boards of companies where we publicly issue securities, if the companies want us to be on. So whenever they have asked us to be on boards of companies where we publicly issue securities, I have normally gone on the boards.

Q What is the reason for your wanting to do that?

A. In order to protect the investors to whom we sold the shares, or whatever it was, and also to be of service to the company, as well.

Q In the past, were many of the companies whose boards you went on, companies that had previously been privately or closely held?

A. Some of them were and some of them weren't.

Q So that those managements didn't have experience in the responsibilities of public ownership?

A. That's right.

Q Have you been teaching, Mr. Levy?

A. Yes, sir, I have been teaching for the last three or four years at NYU.

Q In what school and what do you teach?

A. In the School of Finance and Business Administration, I have forgotten the exact title, I teach for about three or four months every year, twice a month, a course on current events in the investment banking field.

Q Are you a commissioner of the Port of New York Authority?

A. Yes.

Q Member of the Economic Development Council of the City of New York?

A. Yes.

Q In addition, you mentioned that you had philanthropic activities that occupied your time.

A. Yes, sir.

Q I don't want you to mention anywhere you are on the letterhead with a lot of other names or give them money or sit on the dais at dinners.

Are there any such engagements that involve working responsibilities?

A. Yes. I am trustee of the Museum of Modern Art and chairman of their development committee, I am on the executive committee of Lincoln Center --

Q Lincoln Center For The Performing Arts?

A. Yes, and treasurer. I am president and chief lay officer and very active in Mount Sinai Medical Center, which includes a medical school and a hospital.

Q In 1969 and 1970, did Goldman, Sachs have an office manual setting forth for the benefit of its employees its policies and procedures?

A. To the best of my recollection, it did not.

Q Did any department have a manual describing in writing its procedures?

A. To the best of my knowledge, it did not.

Q In 1969 or 1970 were new employees trained and informed of what the policies and procedures of the firm were?

A. Yes, sir. We have had a tradition of on the job man-to-man training for many years, and it has worked quite well.

Q How long has it been done that way?

A. Since I have been there, and we have been in business 107 years.

Q How did Mr. Wilson come to be selected to be the head of the Commercial Paper Department?

A. He had worked there for many years, and along with John Rhoades who was his superior who was the partner in charge of the Commercial Paper Department, we all got to know Bob Wilson quite well, and when John recommended him to succeed him, we all agreed wholeheartedly.

Q How many years had Mr. Rhoades been head of the

Commercial Paper Department?

A. I think as I recall, some seven or eight years, something like that.

Q. He was preceded by?

A. He was preceded by Bob Anderson.

Q. Did the management committee give Mr. Wilson any directions to consult the management committee on matters of credit and marketing of commercial paper?

A. No, sir, it did not.

Q. Was there anyone on the management committee who had background or experience in credit investigation and marketing of commercial paper?

A. No, sir, no one did.

Q. Who made the decision on behalf of Goldman, Sachs to deal in the commercial paper of Penn Central?

A. Mr. Wilson and his associates. I was the new businessman involved.

Q. In other words, you were a contact with the Penn Central for general purposes.

A. Correct.

Q. We will come back to that.

Did he ask your approval for making the decision to take on the paper and offer it in the market?

A. He did not.

Q Did you give any directions to him as to what he was to do about taking it on or not taking it on?

A. I did not.

Q Was that the usual practice with respect to decisions to take on new issuers?

A. It was, and it still is.

Q What is your recollection, Mr. Levy, as to how it came about that Goldman, Sachs began handling commercial paper for Penn Central? By that I mean, of course, the merged combined companies.

A. We had issued commercial paper for one of the -- for the New York Central Railroad at one time, and we had been soliciting other business, we did a little commission business, both New York Stock Exchange commission business, both for the New York Central and the Pennsylvania Railroad Company, and when they merged, I just don't recall whether Bevan contacted me or I contacted him. I do recall meeting him in Philadelphia and riding back on a train with him. We discussed it and he came in for lunch with myself and Bob Wilson, and I think John Whitehead, one of my partners was there, and I don't recall who else was there.

Q I don't want to take a lot of time on the beginning of this.

That would have been sometime in '68?

A. Yes, sir, I believe it was.

Q Did Walter Blaine have anything to do with it?

A. Yes, Walter Blaine had known Dave Bevan for many years.

Q Who is Walter Blaine?

A. He was one of my partners, who is now retired, and Dave Bevan prior to going with the Pennsylvania Railroad had been chief financial officer of the New York Life Insurance Company, and we used to sell the New York Life Insurance Company a lot of bonds, and Dave and Walter Blaine handled that account.

Walter Blaine was in charge of Goldman, Sachs' Syndicate Department and got to know Dave pretty well, and I knew him casually.

Q Was there any contact with the Pennsylvania Railroad before the merger with reference to commercial paper, if you know?

A. I don't recall that there was, but I am not sure of that.

Q What was the volume of commission business that you did with the New York Central prior to the merger?

A. I think a few thousand dollars a year, probably. I have forgotten the exact amount but it wasn't very big.

Q What about the Pennsylvania Railroad?

A. I think it was the same, around a few thousand dollars a year.

Q. As chief financial officer of the New York Life Insurance Company, had Mr. Bevan been in charge of keeping that institution's reserve funds invested?

A. Yes, sir. He had charge of all their investable funds.

Q. Did those investments include so-called private placements where they take an entire issue of debentures or bonds of a commercial or industrial company?

A. Yes, sir.

Q. Is that commonplace with huge life insurance companies?

A. It is.

Q. Is New York Life one of the biggest?

A. New York Life is one of the biggest in the country. The Big Three are the Equitable, the New York Life and the Metropolitan.

Q. What was your own experience of Mr. Bevan's integrity and ability?

A. First-rate fellow in all respects.

Q. Did you know Mr. Bevan's reputation in the financial community at that time for integrity and ability?

A. Yes, sir.

Q What was it?

A. He had great -- his reputation was that he was a top-flight man, honest, trustworthy and capable.

Q He joined, am I right, I think this is reflected in the documents, but to be clear about it, he joined the -- he went from New York Life to become the chief financial officer of the Pennsylvania Company?

A. Pennsylvania Railroad.

Q I mean the Pennsylvania Railroad.

A. I believe that's correct.

Q So after the merger, he became the chief financial officer of Penn Central?

A. Of the Penn Central Company and its related subsidiaries.

Q Did you know any of the other men, if you recall, in Pennsylvania Railroad Company who went over into the merger and continued in the management?

A. Yes. I knew Mr. Saunders very slightly, I met him a couple of times, and I knew Alfred Perlman who came from the Central.

Q That's not my question. I am asking you about the Pennsylvania Railroad. You knew Mr. Saunders?

A. And I knew Mr. Gerstnecker.

Q Would Mr. Gerstnecker have been the --

A. I think he had been the treasurer of the Pennsylvania Railroad Company.

Q. His office in the Penn Central appears in the documents here.

A. Yes.

Q. I think again treasurer or some such position; is that right?

A. Yes, sir.

Q. Did you know Mr. Saunders' reputation in the financial and business community for integrity and ability?

A. Yes.

Q. What was it?

A. He had a first-rate reputation for integrity and ability.

Q. Going over to the New York Central side, had you known prior to the merger, had you been personally acquainted with officers of the New York Central?

A. Yes, sir.

Q. Which ones?

A. I knew Alfred Perlman who was the president and chief executive officer, I knew Walter Grant, who was chief financial officer, I knew Mr. McCrone, who I believe was the treasurer.

Q. Mr. Saunders became chairman of the Penn Central?

A. Of the combined -- after the merger?

Q. Yes.

A. I believe Mr. Saunders became chairman and Mr. Perlman became president and chief operating officer and Bevan was chief financial officer.

Q. Did Mr. McCrone go over to the Penn Central?

A. I believe he did initially. I am not sure of that.

Q. Mr. Grant I think did not. I haven't seen his name appear --

A. No, I don't believe Walter Grant did. He went to Con Edison as --

Q. With reference to Mr. McCrone, Mr. Perlman and Mr. Gerstnecker, did you know their reputations generally in the business and financial community?

A. I had never heard of any slur on their reputations whatsoever. As far as I knew, everyone spoke very highly of them.

Q. Did there come a time when Mr. Perlman left and was succeeded by Paul Gorman as president?

A. Yes, sir.

Q. Do you remember when that was?

A. I think it was sometime late in 1969.

Q. Was it in November of 1969?

A. I think it probably was. I am not 100 percent sure of that.

Q. It appears in the blue sheets.

Where had Mr. Paul Gorman come from?

A. He had come from the AT & T System. He was president and chief executive officer of the Western Electric Company.

Q. Was that a principal subsidiary of AT & T?

A. One of the principal subsidiaries, manufacturing subsidiary.

Q. Did you have any contacts with the AT & T System on behalf of Goldman, Sachs?

A. Yes.

Q. Were you the new businessman for AT & T?

A. I was.

Q. Did you get to know Mr. Gorman in that connection?

A. Yes, sir.

Q. Did you serve with Mr. Gorman on any boards of directors?

A. Yes, I served then and still do as director of the New York Telephone Company, and Mr. Gorman was also on the board of the New York Telephone Company. One of the principal subs of the AT & T Company.

Q What was your opinion of Mr. Gorman's integrity and ability as a businessman?

A A fine person, top-rate operating man, hard-nosed and very excellent fellow.

Q Did you know his reputation in the financial and business community for integrity and ability?

A He had a 100 percent reputation for integrity and ability.

Q Did he stay with the Penn Central after the petition in reorganization?

A No, sir.

Q Where did he go?

A He became chief executive officer of the International Paper Company.

Q Is that a very large --

A It is one of the largest industrial companies in the United States.

Q I am going to ask you to look at Plaintiff's Exhibit F-2 which is a blue sheet by Mr. Wilson dated February 5, 1970. I am not at this point going to question you at any great length about this, but I do want to call your attention to I think it is the third sentence of Mr. Wilson's memorandum.

"Having talked with GLL last night and JCH this morning, I called John O'Herron."

First of all, who is JCH?

A. JCH, I am sure, refers to James C. Hemphill, who is the partner in charge of our Chicago office and who had been in the commercial paper business all of his life.

Q. This made reference to the morning's press announcement of the transportation company's -- not the consolidated results but the transportation company's operating loss of $56 million for the year 1969, and it appears he phoned you about that.

Do you know where you were when he phoned you?

A. Yes, sir. I believe I was in St. Louis attending a May department store's board meeting.

Q. Is that a monthly occurrence?

A. They have meetings about seven or eight times a year.

Q. When you go to those meetings, what time do they start?

A. They start usually at 9:00 o'clock in the morning and are over by about 1:00 o'clock.

Q. What do you do, go out the night before?

A. I go out the night before and come back in the afternoon after the meeting is over.

Q. On this occasion, did Mr. Wilson reach you on the phone when you were out there the night before the meeting?

A. I believe that he did, yes.

Q. Was there anything about Mr. Wilson's telephone call that caused you to change your plans about returning or did you just return as you normally did?

A. I just returned as I normally do.

Q. On the next day did you have a luncheon meeting with Mr. Bevan and Mr. O'Herron?

MR. STITT: Is counsel referring to February 5 or February 6?

MR. PIEL: I beg your pardon, I must have misspoken. Thank you, Mr. Stitt.

Q. I am referring to Plaintiff's Exhibit F-3, which I show you. The first sentence refers to a luncheon meeting with Bevan, chairman of the financial committee, O'Herron, the financial vice president, and Loder, the treasurer, with you and Wilson.

Do you recall that luncheon meeting?

A. Yes, sir.

Q. Where did it occur?

A. As I recall, it occurred at the Recess Club, across the street from our offices at Goldman, Sachs.

Q. I would like you to look this document over.

I have asked you to do that before, but just go through it again now, and tell us if anything comes back to you about the meeting, something of a substantive nature that is not in this memorandum, or do you have any recollection going beyond what is here?

(Pause)

A. No, sir, I don't have any recollection of anything else except what is in the document.

Q. I would like you to read to yourself now, not out loud, read the second paragraph which refers to the railroad's needs and to plans for meeting those needs.

(Pause)

A. Yes, sir, I have read it.

Q. Mr. Levy, I am really focusing on the period involved in this suit, '68, '69 and '70, so if I use the present tense I want you to remember that I don't want to know your answer unless it was true at that time, but how often did you, during that period or in your previous year as an investment banker, have occasion to make a judgment on the feasibility of proposed financing plans?

A. Many times. Very often.

Q. In fact, to save time, if Mr. Stitt will permit a leading question about what we all know is so, investment bankers assist issuers to make investment plans, isn't that true?

A. Yes.

THE COURT: What is a definition of an investment banker?

MR. PIEL: Let's have it from the witness.

THE WITNESS: That's very difficult, Judge.

MR. PIEL: I might say, your Honor, the Investment Bankers Association once wrote a book to try to explain it.

THE COURT: We don't have enough time for that. Just the first three sentences.

THE WITNESS: An investment banker is engaged in financing activities on behalf of industrial, utility and other types of corporations as well as municipalities, for financing their short-term needs, whereby they act as agent, they purchase and sell immediately. In other words, it is distinct from a commercial bank where a commercial bank holds for its own account. An investment bank is a conduit, in effect.

Q. In addition, an investment banker will organize a syndicate of other investment bankers.

A. That's correct, and underwrite, but the purpose is to distribute immediately.

Q. The ultimate purpose is to distribute to the public but the syndicate takes title to the whole issue and takes the risk during the marketing period.

A. That's right. Hopefully that's only a very short period.

Q. And certain firms specialize in being so-called managing underwriter?

A. Yes, sir.

Q. And the managing underwriter organizes the syndicate by inviting other bankers to come in and take shares of the risk, other investment bankers?

A. That is correct.

Q. Commercial banks are forbidden to participate in that business by the Glass-Steagall Act?

A. That's correct.

Q. But the managing underwriter then negotiates the terms and helps the issuer to arrange the terms of the issue that will be offered to the public?

A. That's right. He doesn't undertake them originally unless he thinks they are feasible.

Q. If he thinks they are feasible and undertakes them, he assists the issuer in getting up both the offering documents, the prospectus, the instruments that represent the security and also the registration statement that's filed with the SEC?

A. Correct.

Q Very often the underwriter's counsel are the ones who do all the work?

A. Well, that I don't know.

Q You don't know that that's so?

A. That I don't know.

THE COURT: You want me to assume that when I have the fixed legal fees in the future --

MR. PIEL: It is generally true that the underwriter's counsel are the ones who have had the experience with arranging these financings, your Honor, rather than the company's counsel.

Q Anyway, you must suspect that from the bills you pay, Mr. Levy.

A. Yes, sir.

Q Did you have a view at the time of your luncheon meeting and your discussion that day with Bevan, O'Herron and Loder as to the feasibility of the proposed means of raising funds that are referred to in the second paragraph of this blue sheet, Exhibit F-3?

A. Well, I didn't have an opportunity to study the plans except what they told me, but it sounded on the face of it that they could do it. I am sure they explored this with their managing underwriters, of which we were not one, and the managing underwriters must have said it was feasible.

Q Who were their managing underwriters?

MR. STITT: I object to the conclusion "must," your Honor.

THE COURT: Sustained.

Q Your answer is stricken, Mr. Levy, and I will ask you another question.

Did you know at the time who the managing underwriters for the public offerings of the Penn Central were?

A. Yes, sir. As I recall, I believe it was Kuhn, Loeb, First Boston and Glor-Forgan.

Q What kind of standing have those three firms in the investment banking world?

A. They had at that time excellent standings, all three of them.

Q Their names appear as underwriters, your Honor, on the documents in evidence here and in the credit file, the offering circular and the May 1970 issue which did not eventuate.

A. I believe there was some change in the final document. I believe Solomon Bros. was added as a managing underwriter.

Q Goldman, Sachs was not?

A. Goldman, Sachs was not.

Q I ask you again, with reference to the subject matter --

MR. STITT: May I inquire whether the circular dated May 1970 is in evidence?

MR. PIEL: I guess it isn't. Thank you for the correction.

MR. STITT: I didn't know whether it was or not.

MR. PIEL: No, you are right, it is not. The December offering circular is in evidence. Thank you, Mr. Stitt.

Q Directing your attention again to that second paragraph, based on what they told you about what they planned to do and how they planned to meet their financial requirements, did you have an opinion as to the feasibility of what they were planning to do?

A I felt that the plans were feasible.

Q Did anything that was said at that luncheon meeting or that you had learned by that time about Penn Central from any other source lead you to believe at that time that there was some danger that Penn Central Transportation Company could not or would not pay its debts as they came due?

A. Absolutely not.

Q Did you have an understanding as to why, as is reported in the blue sheet, and now I am directing your attention to the last paragraph on that page going over to the top of the next page -- and I will give you a moment to focus on that before I continue my question.

(Pause)

Q Did you have an understanding of why Mr. Bevan and Mr. O'Herron said that they felt that they did not -- excuse me -- why they said that they did not feel they could get $100 million in bank lines at this time?

MR. STITT: Your Honor, the understanding gives me pause. I am perfectly willing to have this witness testify as to his recollection as to what was said.

THE COURT: I assume this goes to his evaluation of the problem that they were facing and which is part of your case, they should have known.

I will take it.

MR. PIEL: You can't stay out of the operation of the mind on that problem, your Honor.

THE COURT: It is impossible.

(Record read.)

A. Because at that time money was quite tight and the banks, rather than give out lines which may or may not be used, would rather loan their money at the nine or ten percent rates that then existed. At least that was my opinion.

Q What is your recollection of what the level of interest rates being charged for bank loans to corporations was at that time?

A. I think that the rate was somewhere between nine and 10 percent, with 20 percent additional compensating balances.

Q Assuming that a line was going to be given to Penn Central at that time rather than a loan, what would at that time the charge for a line be as compared with a charge for a loan?

A. A line would have been 10 percent compensating balances and perhaps a fee in addition for granting the line.

Q But no interest charge unless and until the borrower took some money down sometime?

A. That is correct.

Q In fact, at this time did Penn Central proceed to obtain bank loans as distinguished from lines?

MR. STITT: I object to the form of this question as being leading, your Honor.

THE COURT: Overruled.

MR. STITT: I am perfectly willing to have the witness give us his knowledge, but I don't believe this question should be asked in that form.

THE COURT: I think technically you are right, but, really, it didn't make any difference.

Go ahead.

MR. PIEL: Your Honor, I apologize and merely point out that it's in the written record and this is preliminary.

Q Do you recall whether or not Penn Central proceeded after this meeting to obtain loans as distinguished from lines?

A. I think they did.

Q Do you know what the loan was that was obtained?

MR. STITT: If your Honor please, we have three corporations here now. We have Penn Central which is the parent, we have Penn Central Transportation and we have the Pennsylvania Company, just to name three, and I would ask that the record would be clear as to just which of these companies is being referred to here.

THE COURT: Does it really make any difference since the money can go up and down?

MR. STITT: I believe it does make a difference, your Honor, since the company issuing the paper is the transportation --

A. I believe the Pennsylvania Company got $50 million in bank loans and passed it upstream to the PCTC.

Q Again in this memorandum there is, in the last paragraph on the first page, "We then got into a discussion of commercial paper." Look at that paragraph, please.

(Pause)

Q Note a statement included in that discussion near the bottom of the first page that says, "We said that in the future we did not feel we could inventory as much of the Penn Central as we had in the past and that Goldman, Sachs felt that five million at any one time would be our limit."

Who said that?

A. Bob Wilson.

Q Did you have an understanding at that time as to why he made this statement to the Penn Central officers at that time?

A. Yes, sir.

Q What was that understanding?

A. Because -- we felt because of the news release stating the loss of $56 million in 1969 that the paper would run down, that we might not be able to find the buyers for the whole 200 million to keep it rolling over, and the purpose of inventory -- the only purpose of inventory is to facilitate sales. We are not a commercial bank, and money was tight, and so we thought that 5 million inventory was enough.

Q Did you have any costs or losses from the process of carrying inventory?

A. Yes, sir, we had a negative inventory carry. In other words, the money we paid to carry our inventory was less than the interest on the inventory that we had in position.

Q Would you say that the interest that you paid was less than you earned?

A. That's correct.

Q Or did you mean the opposite of that? Wouldn't that be a profit?

A. No. The interest we paid to the banks was less than the interest on the paper -- was more than the interest on the paper, pardon me, and, therefore, we had a negative carry.

Q Were there any other costs or penalties?

A. No, except, you know, money was tight at that time and we were carrying a lot of paper for other people as well as the Penn Central, and that was it. Obviously we had to margin these paper inventories, and it took part of our capital, it tied up part of our capital.

Q That's under Stock Exchange rules, you mean?

A I don't think there is any Stock Exchange rule, but the banks required margin.

Q Do you recall something called the blue book study?

A Yes, sir.

Q I am referring to Exhibit 56.

Do you recall a reference in the blue book study to losses from marking up paper in inventory in order to sell it in a time of rising rates?

A Yes, sir.

Q Was that in your mind also at that time?

A Yes, sir.

Q Another statement in the February 6 Blue sheet by Mr. Wilson, at the end of the paragraph that runs over on the top of Page 2 was the following:

"I also explained Alan Rogers' conversation with Jack Vogel and Alan's feeling that as long as Goldman, Sachs was going to continue to handle Penn Central's paper, he would keep the prime rating."

Who was Alan Rogers?

A I didn't know Alan Rogers, but I understand that he was the chief rating man at the National Credit Office.

Q What did you understand to be the meaning of this statement as regards what the National Credit Office would do?

A. My interpretation was --

MR. STITT: I object to the form of the question.

Q What was your understanding?

A. Say that again.

Q What was your understanding?

A. Of what?

Q From this statement as to what it was that the National Credit Office would do with regard to the rating.

MR. STITT: Your Honor, I make the same objection. I presume your Honor would make the same rulings as previously.

THE COURT: That's right.

Q You may answer.

A. I presumed that what it meant was that Alan Rogers was saying that if we continued to sell, he would continue to rate it. If we stopped selling, there would be no reason for him to rate the paper.

Q Did you have any idea that he was rating it primarily because Goldman, Sachs was selling it?

A Absolutely not.

MR. STITT: Objection to the form of the question.

THE COURT: Mr. Piel, that's the way it reads to me and that's the way the original note read to me.

MR. PIEL: We have evidence of an understanding of what it meant.

THE COURT: That's what he thinks it meant to him, but I have read the original, not this, and I gather from reading the original that Rogers said "If you continue to sell it, I will rate it prime."

In other words, Rogers was relying on Goldman, Sachs as to his rating. This is what has bothered me in this case from the time I saw that document. Go ahead. This is what Mr. Levy thinks it meant to him.

Q Do you know if Mr. Rogers is alive?

THE COURT: I don't know whether Mr. Rogers is alive. This is not my problem. I am just telling you how the reading of the original memorandum hit me when I saw it, and I think it is repeated again here.

Mr. Levy is free to say what he thinks it meant to him. I am telling you what it meant to me when I saw the original note.

MR. PIEL: I apologize, your Honor, my question wasn't addressed to the Court about whether Mr. Rogers was alive. I meant to ask the witness, if he knows.

THE COURT: You were looking at me when you said it.

A. I haven't got the remotest idea.

Q Up to March 16, 1970, the date when Franklin Savings Bank bought the note here in suit, had anything come to your attention which caused you to suspect that Penn Central Transportation Company might not meet all of its current obligations?

MR. STITT: I object to that question. It is calling for a conclusion from the witness.

MR. PIEL: I haven't finished.

THE COURT: Whether anything came to his attention calls for a conclusion?

Objection overruled.

Q I will continue the question, if we have it in mind.

MR. STITT: I thought my adversary finished his question. I apologize for the interruption.

Q (Continuing) Which caused you to suspect that Penn Central might not meet all of its current obligations and pay off at maturity the notes that Goldman, Sachs was selling?

A No, sir.

Q Or that for any reason the board of directors at Penn Central might decide -- or Penn Central Transportation Company -- might decide to put the Penn Central Transportation Company into the reorganization court while commercial paper notes were outstanding?

A Absolutely not.

Q Mr. Levy, I would like you to explain to the Court -- to describe to the Court, not at great length, but describe to the Court what your view was as to the future of Penn Central during the time from August 1, 1968 when Goldman, Sachs started offering these notes to investors up until March 16, 1970? What was your view as to the future of the Penn Central?

MR. STITT: Once again, your Honor, I object because we have a confusion of terms. Is he speaking of the Penn Central parent, Penn Central Transportation, the subsidiary that was issuing the paper?

Q Penn Central Corporate Enterprises, the Penn Central System, holding company, transportation company, subsidiaries.

MR. STITT: I would object to the form of that question, because the company we are talking about here is the one that was issuing the paper.

THE COURT: Overruled. I gather money goes up and down in that corporate setup. Go ahead.

A. Your Honor, it was very well-known that both the New York Central Railroad and the Pennsylvania Railroad were losing money, and one of the purposes of the merger was to effect economies, both in personnel and in trackage, so that the two as one entity would be profitable. Also, it was a well-known fact that you can't accomplish those savings overnight. They do take some time.

Therefore, I think all investors expected the railroad part of the Penn Central System to lose money for several years, at least, and the fact that they lost $56 million, somewhat more than was expected in '69, shouldn't come as too much of a shock, although it was larger, as I said, than what they had anticipated. But people and we did, expected the railroad part to lose money for several years. We thought that the other part would more than offset the loss in railroad operations.

Q. In the early part of 1969, did you become the trustee of a trust established by Walter H. Annenberg and Triangle Publications, Inc., which trust contained common stock in Penn Central?

MR. STITT: If your Honor please, this is going to get us into a very deep can of worms. I can tell the Court that this came up during the Welch trial and it caused no end of problems for Judge Bryant, as a reading of the transcript will show.

This line of questioning would develop Mr. Levy's function in this trust and deciding whether or not to sell the stock of this parent company, Penn Central Company, and that would bring us into evaluations of tax considerations, capital gains, and I think it is completely beside the point.

THE COURT: What is the relevance of the question?

MR. PIEL: Yes, your Honor, and my friend in his enthusiasm has grossly exaggerated the situation at the Welch trial where this evidence was admitted.

May I briefly explain the relevance by an offer of proof?

What we offer to prove by Mr. Levy's testimony now is that when Mr. Annenberg became Ambassador to the Court of Saint James in early 1969, he wished to divest himself of direct control of his equity securities. He turned them all over to Mr. Levy with Carte Blanche to do as his judgment should suggest.

Mr. Levy would testify there were no capital gains or tax considerations or any other Annenberg considerations involved, it was only Mr. Levy's judgment of the market that affected his decisions of what to do.

A time came when in the declining equity market and rising interest rates he decided to liquidate the entire portfolio. He sold out all the General Motors, Campbell Soup, the Gerard Trust Company, and started to sell the Penn Central stock that was in there also and to put the proceeds into interest-bearing securities at these high rates, he felt the stock market was going to go down for a long time, he would have it earning high interest rates and when the market came up again he would put it back in equity.

He sold 20,000 out of 180,000 shares of Penn Central. That was a holding worth approximately $10 million. He sold in the spring at 53 -- was that five or fifteen?

THE WITNESS: Around 5500 shares, something like that.

MR. STITT: The spring of what year?

MR. PIEL: In May of 1969 he sold 15,400 of those shares at 53, prices from 52-7/8 to 53-3/4. The market started to decline. In November of 1969, in a general market decline, he sold another 5,000 shares at prices ranging from 32-1/2 to 32-7/8.

Then the market continued to slide fast and Mr. Levy said this market is going to come back, this stock is worth more than I could get for it in the market now, so he held it. At the time of the petition for reorganization, he still held 160,000 shares. I say that is a badge of innocent good faith.

THE COURT: I don't need it for this trial. Objection sustained.

Q I show you exhibits for identification CB, CD and CE.

What is Exhibit CB, Mr. Levy?

MR. STITT: If your Honor please --

MR. PIEL: May I please ask the witness what it is?

MR. STITT: I just wish to make an objection, and your Honor will shoot me down or uphold me very promptly, and then I will not interrupt any further, but this has to do with brokerage reports concerning the stock of Penn Central, and I remind the Court of Mr. Vogel's testimony that he did not consider brokerage reports to be part of the credit inquiry of commercial paper.

MR. PIEL: That is not the purpose that I am offering it for, and I don't offer anything in these documents for the truth of any matter asserted therein, Mr. Stitt.

THE COURT: Go ahead.

Q What is Exhibit CB, Mr. Levy?

A. It is a letter to me from Walter Annenberg dated February 20, 1970, asking me to comment on a memorandum recommending the purchase of Penn Central by Butcher, Sherrerd, an investment company, and Howard Butcher, a member of that firm, had been previously a director of the Penn Central.

Q Do you know what directorships Mr. Annenberg had had before he went to the Court of Saint James?

A. Mr. Annenberg, amongst others, had been a director of Penn Central.

Q What did you do when you got that inquiry from Ambassador Annenberg?

A. I passed it on to our railroad analyst, Mr. Michael Armellino, for his comments, and after getting his comments --

Q Is that Exhibit CE?

A. Yes, sir. I wrote a covering letter enclosing Armellino's comments to Walter Annenberg, stating the facts that were enclosed, and that I was inclined to agree with the position that our analyst takes.

Q That's Exhibit CD?

A. Yes, sir.

MR. PIEL: I offer those in evidence, your Honor.

MR. STITT: Objection as to relevance, your Honor.

THE COURT: Overruled.

xxx (Defendants' Exhibits CB, CD and CE were received in evidence.)

MR. PIEL: I offer in evidence, since there is no objection to the authenticity, Exhibits CG and CH.

MR. STITT: The objection would be as to relevancy.

THE COURT: You will have to tell me what they are.

MR. PIEL: These are the records relating to the purchase by Goldman, Sachs of a block trading position in Penn Central common stock, which is the stock that was outstanding in the hands of the public, and Penn Central owned all the stock in Penn Central Transportation, on May 27, three weeks before the petition, May 27, 1970.

THE COURT: Objection sustained.

MR. PIEL: May I just complete an offer of proof on that, your Honor?

THE COURT: We keep out everything after March 16. Why should I take this in on your case?

MR. PIEL: If I may respectfully explain --

THE COURT: We even excluded, I think, the petition for reorganization, didn't we?

MR. PIEL: Yes, your Honor.

The connection is simply this. Your Honor has permitted inquiry and proof by plaintiff going beyond March 16 with regard to what Goldman, Sachs did with its inventory, the plaintiff's purpose being to show thereby bad faith on the part of Goldman, Sachs in that, as he claimed, has claimed before and will claim again, by running for cover and getting rid of their inventory they were protecting themselves while leaving their commercial paper clients exposed.

Any evidence that shows that they had no idea of any such risk to their commercial paper clients because they had no such idea of any risk to themselves when they invest one and a quarter million dollars in a block of the stock on May 27 is relevant to that challenge to Goldman, Sachs' good faith and intentions with regard to its inventory management problem.

They explain inventory management as though they were feeding bad meat to their best friends and their best customers while abstaining themselves.

I am just showing that they are eating out of the same dish by these other things that they did, your Honor, and that's the purpose of the offer.

THE COURT: Objection sustained.

MR. PIEL: Your witness.

CROSS EXAMINATION

BY MR. STITT:

Q Mr. Levy, you didn't wish to create the impression that during 1968, 1969 and 1970 you personally formed an opinion of your own as to the creditworthiness of Penn Central, did you?

A Let me say this, Mr. Stitt, if I would have thought it was uncreditworthy, I would have let the commercial paper people know my views, so I believe that I -- inwardly, yes, I thought it was creditworthy, otherwise I would have said, "Don't sell it," or suggested that they take another look, which I did not do.

Q Isn't it a fact that you exercised no judgment whatever with respect to the creditworthiness of Penn Central and relied solely on Vogel, Van Cleave and Wilson?

A That is correct.

Q That was for the entire period '68, '69 through, say, April 1, 1970?

A Well, again, you asked -- in the previous question you asked me, Mr. Stitt, I don't mean to be argumentative, if I would have thought it was uncreditworthy, had some negatives, I would have certainly passed them on to Mr. Wilson and his associates.

Q. But you yourself formed no opinion?

A. Again, with that caveat, if that's the proper word. I didn't say that Penn Central notes were creditworthy to sell, but if I would have thought they were not creditworthy, I would have put in my two cents.

Q. Were you asked these questions and did you give these answers at Page 1462 of the Welch trial:

"Q. Were you competent to grant an opinion on the creditworthiness of Penn Central?

"A. I was not.

"Q. So that at no time during 1968, 1969 and 1970 did you personally have an opinion formed on your own as to the creditworthiness of Penn Central, is that correct?

"A. I relied solely on the judgment of Wilson and his men, Vogel, Van Cleave, and they had the right to buy or not to buy or to issue or to sell and not to sell.

"Q. You exercised no judgment whatsoever with respect to the creditworthiness of Penn Central?

"A. I relied solely on their judgment."

Did you give those answers to those questions?

A. Yes, sir.

THE COURT: Mr. Stitt, this is the fourth time I have told you, please stop reading from depositions or trials of testimony that is not inconsistent with what the witness has stated from the stand.

There is nothing inconsistent in what you have just said with what the witness has stated from the stand. We are wasting time.

Q Isn't it true, Mr. Levy, that Goldman, Sachs possessed nonpublic information on Penn Central?

A Yes, I guess that's true, as to their financing plans. Yes, I guess that's true.

Q You knew that at the time, didn't you, in 1969 and 1970, that Goldman, Sachs possessed nonpublic information on Penn Central?

A Yes, that's true.

Q And you did not instruct disclosure of that information to the Franklin Savings Bank or any other purchasers or existing holders of Penn Central commercial paper?

MR. PIEL: If your Honor please, I think that's a compound question. Maybe we could have the Franklin Savings Bank alone.

I would like to interpose an objection to this line of questioning as totally irrelevant on the basis of

Mr. Bock's testimony that they didn't tell him anything about Penn Central and that he didn't check anything before he bought this note. So there could be neither a misstatement nor an omission to state something necessary to make statements made not misleading.

THE COURT: It may be the latter part. I don't know what is meant by public information.

THE WITNESS: Your Honor --

THE COURT: I am asking counsel. You put it in your question.

Q Would you answer that question, Mr. Levy?

THE COURT: No, I want to know from you what you mean by it.

MR. STITT: I am referring to information in Goldman, Sachs' files which was not known to the public.

THE COURT: Do you mean that there is a duty on any investment banker to give out weekly or daily sheets of everything that's in their files?

MR. STITT: They owe a duty, and I submit it is quite clear, your Honor, under the Radiation Dynamics case, that when they are in possession, regardless of how they got the information, of inside material information regarding the company --

THE COURT: Now you have a limitation. Now it is material information. Anything else you want to add?

Your answer to my question is that anything they knew they had to tell the public. I assume you don't really mean that.

MR. STITT: No, it must be material, your Honor, obviously.

THE COURT: Now, what do you mean by material?

MR. STITT: The definition of material, as I understand the Affiliated Ute case, is any fact, any material information to which a prospective purchaser of the security might attach importance in making his decision or in the context of his decision to buy that security.

THE COURT: That's a rough approximation of what the Ute case says.

MR. PIEL: May I add a footnote?

THE COURT: I just want to know what's in Mr. Stitt's mind. Now that we know what's in his mind, we want an answer to his question.

Did you have any material information in your possession --

MR. STITT: The question was with regard to nonpublic, your Honor. "Material" I admit is an issue in this case.

THE COURT: Again, I must sustain the objection to the question.

Do you mean anything that's in their file? That's ridiculous. The file is that thick.

MR. STITT: Your Honor, I have to take it bite by bite. First I have to establish that there was information which was in either Goldman, Sachs' files or elsewhere which -- Goldman, Sachs, and they would have the burden of proof, but elsewhere, which they could have obtained in the exercise of reasonable care.

THE COURT: That would have an impact on a legal duty that they had to their purchaser. Limit it to that. I don't want a letter in there that so-and-so broke his arm and couldn't come to the office for a week.

MR. STITT: No, no.

THE COURT: That is what your question embraces.

MR. STITT: I also recognize that this information would have to have been considered adverse. That's a question the Court is going to have to address itself to.

THE COURT: I sustain the objection to your question as put.

BY MR. STITT:

Q Did Penn Central officers ask you to withhold nonpublic information from Franklin or any other prospective purchaser?

A. Mr. Stitt, I didn't hear the first part. Did the Penn Central officers ask me to?

Q. Yes.

A. No, sir. Not to my recollection, but Penn Central officers asked me to withhold?

Q. You answered the question, Mr. Levy. Thank you.

A. I just wanted to make sure I heard you right.

Q. You testified on direct examination about the access that you had to Penn Central financial officers, didn't you?

MR. PIEL: Excuse me, Mr. Stitt. For purposes of redirect, may I have the previous question read so I know what it was? I was confused by the question and answer.

(Record read.)

Q. I take it, Mr. Levy, that whenever you telephoned Penn Central financial officers, they answered promptly.

THE COURT: What?

MR. STITT: I may have gotten ahead of myself.

Q. You had access, did you not --

THE COURT: Wait. Strike that question. Start over again.

Q. Mr. Levy, did you have access to financial officers of Penn Central during the years '68, '69 and '70?

MR. PIEL: I object to the form of the question, unless access is defined.

Does it mean did he know their telephone numbers or what?

Q. Did you communicate with financial officers of Penn Central during those years?

A. I already testified that I had conversations with Bevan on February 6, or whatever it was. So, yes, I talked with him during those periods, but not frequently.

Q. You also spoke on occasion with Mr. O'Herron?

A. I don't recall that I spoke to John O'Herron, except if he would have been at that meeting. I think Mr. Wilson, my associate, had contact with John O'Herron.

Q. Do you recall whether Mr. O'Herron was at the meeting of February 6, Exhibit F-3?

A. I don't recall, I am not sure -- can I take a look at the memorandum?

Q. No, just of your own recollection, do you recall his being there?

A. I don't believe he was there, but I am not sure.

Q. Your best recollection is that he was not there?

A. That's my best recollection, but I am not 100 percent sure.

Q You are not 100 percent sure?

A. That's right.

Q Was there any occasion on which you were refused the opportunity to talk with any financial officers of Penn Central?

A. Refused by whom, Mr. Stitt?

Q Was there any occasion when you called and if they weren't in you didn't get a prompt call back?

A. I don't recall if there were any such occasions.

Q Wilson was also in communication in '69 and '70 with O'Herron and Bevan, was he not?

A. I am sure he was, but you will have to ask him that. I am pretty sure he was. Obviously, he was.

Q Did any situations come to your attention in which financial officers of the Penn Central refused to speak with anyone from Goldman, Sachs?

A. I can't -- no such instance came to my attention.

Q Did any situation ever come to your attention in which financial officers of Penn Central refused to give information to anyone from Goldman, Sachs?

A. I don't know that there were any such instances.

Q Isn't it true that Penn Central always gave Goldman, Sachs' representatives whatever information they asked for?

A. I can't answer that, sir, because I don't know what they asked for.

Q At Page 101 of your examination before trial, were you asked this question and did you give this answer:

"Q Was there ever any situation which you know of in which the financial officers of Penn Central refused to give information to anyone else from Goldman, Sachs & Co.?

"A. I don't know. I believe they always gave them whatever information they asked for."

A. That's what I said. I said that before. But that's not what you asked.

MR. PIEL: May I object to the reading as a waste of the Court's time?

THE COURT: I don't know why you do it, Mr. Stitt. You persist. All you do is prolong the trial.

MR. STITT: I am sorry, your Honor. I thought I had an ambiguity there.

Q In addition to Mr. Bevan, you knew personally five other Penn Central directors, did you not?

A. Let me count them. I knew Mr. Saunders slightly, I knew Mr. Perlman, I knew Mr. Gerstnecker --

Q Was Gerstnecker a director?

A. No, I don't think he was. Are you talking directors?

Q Directors I am talking about now, yes.

A I have forgotten who the directors were, Mr. Stitt.

Q Let me list a few. You knew Bevan and you knew Gorman?

A Right.

Q Did you know Mr. Frenzel?

A Yes, I did know Mr. Frenzel.

Q And Mr. Gengras?

A I knew him.

Q You told us about Mr. Perlman whom you knew.

Did you also know Mr. Seabrook, a director of Penn Central?

A Yes, I knew Mr. Seabrook.

Q You testified in addition to those you had had some acquaintance with Mr. Saunders.

A Yes, sir. Very slight acquaintance.

Q Saunders was an old friend of your partner Henry Fowler, was he not?

A That's correct.

Q They grew up in the same town.

A Roanoke, yes.

Q They were in regular contact in '69 and '70 on other matters besides Penn Central, weren't they?

A. I have no personal knowledge of that, but I guess they were.

Q. Their friendship has continued over the years?

A. Yes.

Q. Isn't it true that among the items of nonpublic information which Goldman, Sachs received from Penn Central was that the first-quarter 1970 earnings would be substantially below Penn Central's initial expectations?

MR. PIEL: Will you fix a time?

Q. 1970.

MR. PIEL: I object to the question. Questions of knowledge, notice and the like after March 16 are not relevant.

THE COURT: He means prior. I assume he is referring to the February exhibits of the estimated earnings.

Is that right, Mr. Stitt?

MR. STITT: Those and perhaps other sources, your Honor.

THE COURT: I don't know what you mean by perhaps other sources. Why don't you show the witness the document?

Q. Let me just show him his testimony, your Honor, at Pages 66 and 67 of the trial transcript, beginning with

Line 19, Mr. Levy, and continuing over to Page 67 through Line 3 or 6, I will give you your choice.

A I read it.

Q You gave those answers to those questions?

A Yes, sir.

THE COURT: What are they?

MR. PIEL: Are you talking about the trial transcript of the Welch case or the deposition or what, sir?

MR. STITT: His deposition, Pages 66 and 67. I will read them. Beginning at Line 19:

"Q Is there information which Goldman, Sachs & Co. received from Penn Central which is nonpublic?

"A At the time?

"Q Yes."

MR. PIEL: If your Honor please, the time has not been fixed.

THE COURT: That's right. Strike that question and answer.

MR. STITT: "Q Yes.

"A I think there probably was.

"Q Can you state what that information was?

"A I think that we had knowledge that the first-quarter earnings would be substantially below their expectations.

"Q Anything else?

"A There may have been other things, but I don't recall."

MR. PIEL: If your Honor please, I object to the question being put to the witness without a time fixed for this alleged knowledge.

THE COURT: Sustained.

Q I am referring to the first-quarter earnings for 1970.

Didn't you have advanced knowledge concerning those earnings?

MR. PIEL: Objection.

THE COURT: Before they were made public?

Q Before they were made public.

MR. PIEL: Objection unless the time is fixed when he is supposed to have had the knowledge.

THE COURT: Let's first fix the time when they were made public. That's easy to ascertain, is it not, Mr. Stitt?

MR. STITT: Yes. The defendants have an exhibit --

THE COURT: You have an exhibit for the first-quarter earnings?

MR. PIEL: The first-quarter earnings were not made public until after the date of this purchase. They were made public about April 14.

MR. STITT: They were made public on April 23, your Honor.

MR. PIEL: April 23, thank you.

THE COURT: Then I sustain Mr. Piel's objection. They may have found out about it April 10.

Q Is that your testimony, Mr. Levy?

THE COURT: No, that's not his testimony. It's your job to show that he knew that the first-quarter earnings were going to be less, prior to March 13. Those questions that you put don't --

MR. STITT: All right.

Q Will you tell us when you learned that these earnings were going to be below expectations, Mr. Levy?

A. I don't really recall, Mr. Stitt.

Q Mr. Levy, I want to ask you some questions about bank lines. I believe that also came up on your direct examination. Let me ask you one broad question.

In the contact of commercial paper, are bank lines important?

A. Yes, the answer is yes and no, and I will try to explain that if I can, Mr. Stitt.

Q Your answer, I suppose, would be yes, among other considerations?

MR. PIEL: Your Honor, may the witness finish his answer, please?

THE COURT: If he doesn't want it, I can't force him to take it. He is going to take a yes or no answer. That's his business.

MR. PIEL: Then I move to strike the answer as having been interrupted and not completed.

THE COURT: I am sorry, it has not been. The witness wants to volunteer something and the examiner doesn't want any volunteering. You have a right of redirect, if you wish.

MR. PIEL: His answer was yes and no.

THE COURT: If Mr. Stitt wishes to take it, he can.

Q Mr. Levy, you answered yes and no as to the importance of bank lines in the context of commercial paper.

Would you expand on that answer for us, please?

A. Yes, I will try to.

Bank lines are ephemeral because when trouble comes they disappear. They are not there in bankruptcy to furnish money to the company that has the bank line. However, they are of some protection to both the issuer and to the investor in uncertain times, to take care of temporary aberrations in the market, and such things as that. But when you really need them, if you are bankrupt, they are not there. That's what I meant by yes and no.

Q Is it true that bank lines add safety to an investment in commercial paper?

THE COURT: I think what Mr. Stitt is trying to find out is if you have a bank line, is it easier to sell the commercial paper than if you didn't have a bank line?

THE WITNESS: In practically all -- all issuers of commercial paper have some bank lines, your Honor. Some have 100 percent and some have less.

THE COURT: I think that's what he is getting into now.

Go ahead, Mr. Stitt.

Q Aren't bank lines a source of protection for investors in commercial paper, Mr. Levy?

MR. PIEL: If your Honor please, I object. It is just asked and answered right now.

THE COURT: Yes, on selling the paper it has an advantage.

Q Beyond that, is it also in addition to being a marketing factor, is there also some protection there for the investors?

A. Only in the case of temporary aberrations of the market.

Q You did recommend on February 6, did you not, that you and Mr. Wilson and Penn Central increase its bank line coverage by $1 million so it would go from 50 to 100 percent?

A. Yes, sir, that's true.

Q In making that recommendation, didn't you make it --

THE COURT: Pardon me, it is 100 million, isn't it?

THE WITNESS: 100 million, yes.

THE COURT: I have already told you how impressed I am by zeros. Let's get all the zeros in.

Q When you made that recommendation for an additional $100 million in bank line coverage to go from 50 to 100 percent, was that made for the protection of the investors as well as for the railway?

A. It was made for only one purpose, Mr. Stitt, and that was we felt that the paper, because of the announcement -- Wilson felt because of the announcement of the $56 million loss for 1969 that the paper would start to run off.

In other words, we wouldn't -- as maturities came due, we wouldn't be able to resell it, and, therefore,-- and we didn't want to inventory it, because the only purpose of inventorying it is for marketing purposes, and, therefore, we thought it was wise for them to increase their bank lines from 50 to 100 percent.

Q So there would be a haven after this run-off for the paper that wasn't covered by the existing lines?

A. It would take up the paper that ran off that we couldn't sell.

Q In addition to bank lines, are there other factors which are important in the context of commercial paper? I will just list them one, two, three, Mr. Levy, and you can give me a yes or no and an explanation.

First of all, working capital, is that an important consideration in the context of commercial paper?

A. I would say yes.

Q Next, earnings?

A. I would say relatively unimportant.

Q But of some importance?

A. Yes, I would say of some importance.

Q And liquidity of assets?

A. Assets are very important. Liquidity of assets, yes, I would say that's important.

Q And liens against or encumbrances of assets, is that an important factor?

A. Yes.

Q You were asked questions on direct examination with respect to inventory. I ask you whether you discussed the inventory -- you did testify that you discussed the inventory of Penn Central with Mr. Wilson --

A. You mean Goldman, Sachs' inventory?

Q Yes, Goldman, Sachs' inventory of Penn Central, you discussed that with him first on the night of February 4, didn't you, when you testified, or was it the next day?

A. No, sir, I didn't testify to that at all.

Q Sometime during February you discussed the inventory of Penn Central with Mr. Wilson, didn't you?

A. I was present at that luncheon when Mr. Wilson said that all he wanted to carry was $5 million.

Q Did you discuss the inventory of any other specific issuer with Mr. Wilson or had you discussed the inventory of any other specific issuer with Mr. Wilson by, say, February 1970?

A. Mr. Stitt, I didn't say I discussed the inventory of Penn Central with Mr. Wilson. I said I was present while Mr. Wilson recommended an inventory of $5 million, and I didn't say no --

Q You were there --

A. I was there.

Q. -- when that discussion was going on?

A. The only other inventory we discussed was the total inventory which we limited to some hundreds of millions of dollars.

Q. So Penn Central would have been the sole individual issuer that you were concerned with?

A. Because --

THE COURT: At that luncheon meeting with the Penn Central people.

THE WITNESS: That's right.

Q. I am asking you, on any prior occasion had you discussed with Wilson the inventory level of any specific issuer?

A. I don't recall that I had because all the other paper was moving fairly rapidly.

MR. STITT: Your Honor, I wonder if I might have a moment. I believe I may be able to finish up with this witness in about ten minutes.

THE COURT: We will have a short recess.

(Recess.)

Q. Mr. Levy, just a few questions.

Prior to the Recess Club luncheon of February 6 recounted in Exhibit F-3, on direct testimony, you testified that Mr. Wilson on the night of February 4 called you at St. Louis; is that correct?

A. In the afternoon sometime.

Q. And you also --

A. That's right, the night of February 4.

Q. You also mentioned a telephone call according to Exhibit F-2 that he made that same night to Mr. Hemphill.

A. Yes. I don't know when he called Mr. Hemphill, but he spoke with Mr. Hemphill.

Q. Where is Mr. Hemphill located?

A. Chicago.

Q. Could you tell us how the Recess Club luncheon of February 6, among you, Wilson, Bevan, Mr. O'Herron who was there, according to Exhibit F-3, and Mr. Loder, was arranged?

A. I am really not sure whether Bob Wilson arranged it or asked me to call Bevan and arrange it. I just don't recall, Mr. Stitt.

Q. Either one or the other?

A. Either one or the other, or Bevan called -- I don't know who called who, in other words. I am not sure who initiated the luncheon.

Q. But someone from Goldman, Sachs called Bevan to initiate --

A. Or Bevan called Wilson.

THE COURT: Wait, wait.

MR. STITT: I am sorry, I am not trying to put words in his mouth.

THE COURT: You obviously are.

MR. STITT: Then I apologize to the witness and to the Court.

THE COURT: He said he doesn't know, he said that on direct, as I recall.

Q. One last item, Mr. Levy. On direct examination you mentioned a report on the Commercial Paper Department which has been received as Exhibit 56 in this litigation bearing date of March 1970. I made arrangements during the recess for you to have the original of that report before you.

Do you have that in hand?

A. Yes, sir.

Q. Without going into the report in detail, is it true that several partners disagreed with the recommendations in that report?

A. I think that's probably true.

Q. Is that your best recollection?

A. Yes.

Q. Is it also true that Mr. Whitehead, and I might use your words, was the most vociferous opponent of those recommendations?

A. I believe that's true.

Q. He was head of the New Business Department?

A. He was and still is, yes, sir.

Q. And he is also the author of this memorandum on that report, Exhibit 56 for identification?

A. It's a memorandum to me from John Whitehead.

Q. You remember receiving that, don't you?

A. Yes, sir.

Q. Your position on this inventory matter was somewhere between Mr. Wilson's and Mr. Whitehead, referring to that report?

A. I think that's true.

Q. Isn't it a fact that that report, Exhibit 56, was not adopted by either the management committee or the partnership?

A. Well, the blue book itself has not been adopted, but lots of ideas embodied in the blue book have been adopted. For instance, today we have got --

Q. Let me just try to --

MR. PIEL: Your Honor, may the witness finish answering the question?

THE COURT: Do you need it?

MR. STITT: I don't need it today, your Honor.

I would simply ask the witness whether as of the date of the reorganization proceeding, June 21, 1970, either the management committee or the partnership adopted that report.

MR. PIEL: He answered that.

THE COURT: He said the report was never adopted in toto.

MR. STITT: Then, your Honor, with the witness' nod --

THE COURT: You are leaving me now that I don't know what was adopted and what was not, and I don't know the impact on your case.

Q Would you tell us what was adopted prior to June 21, 1970, to the best of your recollection, Mr. Levy?

A I don't think anything was adopted prior to June 21, 1970.

MR. STITT: Thank you, Mr. Levy. I have no further questions of this witness, your Honor.

REDIRECT EXAMINATION

BY MR. PIEL:

Q Mr. Levy, were you in touch with the day-to-day operations of the Commercial Paper Department?

A I am not in touch --

Q I am talking about in 1969 and 1970.

A No, sir.

Q Did you know at that time, contemporaneously, not what you may have learned since, but did you know contemporaneously what Mr. Van Cleave, Mr. Wilson and Mr. Lynch were doing regarding talking to issuers about swing lines, inventories?

A. I did not.

MR. PIEL: Thank you.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Next witness.

JOHN J. SULLIVAN,

called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PIEL:

Q You are an officer of Manufacturers Hanover Trust Company?

A. Yes.

Q What is your position?

A. I am a senior vice president.

Q What was your position in 1969 and 1970?

A. I was a vice president to the bank then.

Q What were your duties?

A. I was responsible for what we call the mid-

Atlantic District of the National Division.

Q Will you explain that in terms of the bank's structure and how it gets its work done?

A Yes. The National Division handles the bank's business outside of New York City within the continental limits. The National Division was then broken down into about six geographic areas.

The mid-Atlantic District was one and included the States of New Jersey, Pennsylvania, Delaware, Maryland and the District of Columbia.

Q That was your area?

A I was responsible for the business in that area.

Q That is for any service that the bank would render to clients of the bank located in that area outside of New York City?

A That is correct.

Q Were you responsible for the bank's decisions -- withdrawn.

Were you responsible for handling the matter of loans that would be made to clients of the bank in that area?

A Yes, I was.

Q Did that apply to consumer credit loans?

A No, it did not.

Q Or small personal loans?

A. No. Small personal loans are handled out of a separate department of the bank.

Q What kind of lending activity were you responsible for?

A. I was responsible for lending to the customers we solicited and serviced, and, for the most part, they were large nationally known companies.

Q Including the Penn Central?

A. Including Penn Central.

Q Did you have authority to grant loans without consultation with superiors?

A. We technically have a dual signing system so that in the National Division all loans are approved by two officers. I did have signing authority in conjunction with other officers of the bank.

Q Up to what limit?

A. At that time, with a junior officer, up to a limit of, I believe, three to $5 million, and with a senior officer, to amounts in excess of -- to amounts up to the legal limit of the bank.

Q If you were dealing with amounts in the neighborhood of ten to $20 million, what would be the procedure for deciding, I don't mean investigation and the like, I mean chain of authority, decisionmaking, what would be the procedure for determining whether or not that loan would be made?

A. I would recommend it initially and seek the necessary approvals of senior officers.

In the case of an amount of $10 million, I would get the approval of the head of the National Division who was a general loan officer.

Q. General loan officers have authorities up to what amount?

A. I believe then it was $10 million.

Q. If it were an amount in excess of that to the same borrower?

A. Two general loan officers' approval would be required.

Q. I believe these matters all appear in documents here, so just to summarize this as being the subject matter that I want to ask you about, is it correct that Manufacturers Hanover had a 20 million participation in the 300 million revolving credit agreement with Penn Central Transportation Company?

A. Yes, that's correct.

Q. It had a 3 million participation in the 50 million dollar Euro-dollar revolving agreement with Penn Central

Transportation Company?

A. That's correct.

Q It made, without participation with other banks, an unsecured loan to Penn Central Transportation Company which was last renewed by a new loan or a replacement loan in December 1969, which started out at $13 million in April, was it, 1969?

A. In early 1968, I believe.

Q In early 1968:

THE COURT: How much was it in December of 1969?

Q $7-1/2 million?

A. That's correct.

Q. In February of 1970, it took a $10 million participation in what was known as the bridge loan and which was a loan made to Pennsylvania Company, a wholly-owned subsidiary of Penn Central Transportation Company?

A. That's correct.

Q That was an unsecured loan?

A. Yes.

Q So that your total loans to the complex as of early February 1970 was $40-1/2 million, is my arithmetic on that amount.

Do you know whether, in terms of the total amount of credit extended or money loaned, is Manufacturers Hanover the largest lender to Penn Central, or second, third, or what number?

MR. STITT: I object to the form of this question.

MR. PIEL: If he knows.

THE COURT: Overruled.

A. So far as I know, we were not the largest lender but amongst the top half-dozen lenders in amount outstanding.

Q. The largest lender was?

A. I believe it was First National City Bank.

Q. How long had a lending relationship existed between your bank and Penn Central?

A. The relationship went back to the early part of the Twentieth Century, is my understanding.

Q. With the Pennsylvania --

A. With both the Pennsylvania Railroad and the New York Central.

Q. When did you first have responsibilities with regard to loans extended to Penn Central, and by that I mean either Penn Central or its predecessors?

A. I first became involved in the relationship in the early sixties. I believe it was in 1962.

Q. We will get to more particular questions about

Penn Central, but just for a little background, would you give us a general description of what your bank did in those times, what the practice was, with regard to investigating and considering the credit of a company that was coming to you to borrow money?

THE COURT: In 1962?

MR. PIEL: No, no, I beg your pardon, in 1969 and 1970.

MR. STITT: If your Honor please, we are talking about Penn Central Transportation Company and commercial paper, and I just question the relevance of this line of questioning.

THE COURT: Overruled.

Q Do you have my question, Mr. Sullivan?

A. Yes. You asked what our practice was with regard to approving the credit of a company requesting a loan.

It was the practice of the bank to lend -- it was and is -- only to those companies with whom we had relationships and with whom we were familiar.

THE COURT: Familiar with what?

THE WITNESS: Familiar with the management and the financial condition. We would investigate the backgrounds of the management and determine whether we thought they were competent as managers.

Insofar as the financial condition of the company was concerned, we would analyze the balance sheets and operating statements and other financial data that was made available to us by the company and credit services, such as Standard & Poor's, Moody's, and others.

Q What others? I think we should know what others, if you can tell us.

A There are other more specialized credit services than Moody's and Standard & Poor's. I don't recall --

Q Let's get with specific reference to railroads. Moody's has a separate and special service on railroads.

A There are transportation manuals available from Moody's and there are services, the names of which I do not recall, that make available ICC information in a digestible form.

The bank's practice is to review the names of borrowers and applicants for borrowing, for loans, in our Credit Department. The report is then reviewed by the lending officers responsible for the relation or the geographic location, if no relationship exists.

Q How much money was owed to Manufacturers Hanover by the Penn Central complex on June 21, 1970?

A Approximately $45 million.

Q I show you a document produced from your file marked here Exhibit BY for identification.

I ask you if you can identify that document for us.

A. Yes, I can.

Q What is it?

A. It is a listing of the secured and unsecured outstanding loans to the Penn Central Transportation Company by a long list of banks and loans also to the Pennsylvania Company.

Q The Penn Co. heading on the right that extends across four columns is loans to Pennslyvania Company?

A. Yes.

Q And to the left of that are loans to Penn Central Transportation Company?

A. That's correct.

Q We see the 300 million revolving credit commitment, we see unsecured bank lines, then we see the Euro-dollar loan, and then there is something called working capital loan with a total outstanding of $30.4 million.

Is that the bridge loan?

A. No.

Q What is that loan?

A. Those were loans made by First National City

Bank and Chase to Penn Central Transportation Company.

Q I, of course, misspoke because the bridge loan is over under Penn Co.; is that right?

A. That's correct.

Q Is the bridge loan the column headed Chemical 50 Million?

A. Yes, it is.

THE COURT: What is this Euro-dollar loan?

THE WITNESS: That's a $50 million loan that was made by a group of banks, I believe, in early 1969 to Penn Central Transportation Company.

THE COURT: What does the Euro-dollar have to do with it?

THE WITNESS: The dollars were provided out of Europe. They were provided by European branches of the American banks.

THE COURT: Go ahead.

MR. PIEL: I offer it in evidence.

THE COURT: Any objection?

MR. STITT: May we have the date this document was prepared?

Q Can you fix the date as nearly as possible from inspection?

A. My recollection is that this was prepared in early June 1970.

MR. STITT: Your Honor, my objection would be as to relevance.

THE COURT: Overruled.

xxx (Defendants' Exhibit BY was received in evidence.)

Q Let's turn first to the $300 million revolving credit agreement.

That started out at some earlier date as an agreement by which the banks undertook to lend up to $100 million; is that right?

A. That's correct.

Q And then in April 1969 was expanded from 100 million to $300 million that the same group of banks would stand ready to lend upon call?

A. I am not sure that it was the same group of banks, but it was expanded from 100 to $300 million.

Q You may have added some banks or membership in the group might have changed, is that it?

A. Yes.

Q That was a firm commitment for a period of time; is that right?

A. Yes.

Q Until when?

A. I believe until 1976.

Q. And it was also agreed as part of that agreement that $50 million of it would be segregated and made available to back up commercial paper in case of a need to meet maturities at some time?

A. That is correct.

Q. Now I show you Exhibit BD for identification.

Were you the author of that document?

A. Yes, I was.

Q. Was this document made by you to record a meeting held, your participation at a meeting held at the First National City Bank with the financial management of the Penn Central Company in March 1969?

A. Yes.

Q. Is it a regular standard practice in your organization to prepare record memoranda of this kind with respect to meetings in which you discuss finances?

A. Yes, it is.

Q. And are they kept as part of the records of Manufacturers Hanover?

A. Yes.

MR. PIEL: I offer it in evidence.

MR. STITT: No objection, your Honor.

xxx (Defendants' Exhibit BD was received in evidence.)

Q Does this deal with the increase in the revolving credit agreement from 100,000 to $300,000?

A. Yes, it does.

Q Is there an attachment on this exhibit to your memorandum that lists the participant banks in the original 100 million and in the 200 million increase?

A. Yes, there is.

Q Showing that you doubled your participation, Manufacturers Hanover?

A. Yes.

Q Is there also a document attached entitled Penn Central Company's Source and Application Statement, 1968 and 1969?

A. Yes.

Q Will you tell us what that is?

A. This was prepared by Penn Central to show the sources of cash, actual in the case of 1968 and forecasted in the case of 1969, and the uses to which cash was put in '68 and was expected to be put in 1969.

Q How long did that meeting go on, if you recall?

A. I don't recall the length of it.

Q What is your best recollection?

A. A couple of hours.

Q Having looked through this memorandum, does this record, what would you say, the highlights or the substance, omitting details, or what?

A That would be the highlights of the meeting.

Q There would have been further detailed discussion occupying the two hours?

A Yes.

Q While you are looking at that source and application statement, was that examined at the meeting?

A My recollection is that it was reviewed by Mr. Bevan.

Q Did he get questions from the bankers about it while he reviewed it?

A I don't recall specifically that there were questions, but in meetings like that, there usually is questioning of the financial officers.

Q In your consideration of whether or not to double your participation by another $10 million in the loan that was going to go out to 1976 for a line of credit, I guess that is not the right term, is it, line of credit? It should be called a revolver?

A Revolving credit.

Q Revolving credit agreement, because it was a fixed term and it was a commitment; is that right?

A. Yes, it was.

Q. In your consideration of the decision to double your participation and have that money out until 1976, did this source and application statement have significance for you?

A. Yes, it did.

Q. Will you please review this and explain to the Court what significance this did have for you regarding the credit of Penn Central Company?

A. This was one of the items we considered in reviewing the credit of -- the financial condition of the Penn Central at the time. It showed a fairly substantial flow of cash from depreciation and equipment financing, but it also showed in 1969, that is, but it also showed the heavy requirements to meet maturities and to provide capital expenditures during the year.

Q. By the way, so we are clear on our terms, at this time in April or March, excuse me, March 12, 1969, the date of this meeting, Penn Central Company was the parent company, the railroad company, and was the publicly-owned company which owned operating and nonoperating subsidiaries; is that right?

A. That's correct.

Q. Then on October 1, 1969 that company, that same company, changed its name to Penn Central Transportation Company, and a new company took the old name and became a holding company over it; is that correct?

A. That's correct.

Q. So that if we go back to the sheet that showed the revolving credit agreement where it says at the top Penn Central Company Credit, after October 1, 1969, that was an agreement that -- revolving credit agreement held by Penn Central Transportation Company; is that right?

A. That's correct.

Q. At this time in deciding to double your commitment by another $10 million out to 1976, was any special credit analysis or investigation made?

A. I don't recall that there was a special credit analysis made. It is the practice of the bank to review periodically the credit of borrowers and particularly those where we have sizable commitments outstanding or to be outstanding.

My best recollection is that there was no extensive new credit analysis done, but there was reliance on the review which had been done at an earlier date and by our analysis -- by "our" I mean the responsible officers-- of the new material which was furnished by the Penn Central at the meeting.

Q You kept yourself informed about its published figures and the service manuals like Moody's? Did someone in the bank follow those in the interim?

MR. STITT: I object to the leading, your Honor.

THE COURT: Overruled.

A. We kept ourselves informed through the media of published financial statements of the Penn Central.

Q But without making some formal display or memorandum out of the whole thing; is that correct?

A. That's correct.

Q Now, let's go to the paragraph that begins at the bottom of the page, Exhibit BD.

According to this, Mr. Bevan said he didn't feel in a position to forecast specifically beyond the balance of the year 1969. However, he reviewed sources of repayment for the 300 million credit --

MR. STITT: May I ask counsel where he is reading from?

MR. PIEL: The paragraph starts at the bottom of Page 1.

Q I am not going to burden the record by reading this, but I would like you to read through that and note what he is saying about sources of repayment.

(Pause.)

Q Mr. Sullivan, based on your familiarity with that railroad, with the condition of the financial markets at the time, were you satisfied that Mr. Bevan's explanation of how he expected to, in the course of time, be able to meet this obligation of $300 million, that that was reasonable and feasible?

A Yes, I did.

Q Do you see the third source of repayment that he mentions, a third source of repayment is the sale of individual investments in Pennsylvania Company?

A Yes.

Q The stock of Pennsylvania Company, had that been pledged by this time for the Euro-dollar revolver?

A No.

Q Or for this revolver?

A It was eventually pledged as security for the $300 million revolver.

Q But that did not prevent the use of at least some of the assets of subsidiaries to support financials for upstream assistance to the parent; is that right?

MR. STITT: I object to the form of the question, your Honor. It is leading, it goes to a very complicated document.

THE COURT: I don't understand it myself.

MR. PIEL: I will withdraw it and try again.

MR. STITT: A very lengthy document, I should say.

Q When was the stock owned by Penn Central Transportation Company in Pennsylvania Company pledged to secure the revolver, the 300 million revolver?

A. In May 1969.

Q Thereafter, Penn Central Transportation Company could not have sold the stock of Pennsylvania Company without a release from the lenders?

A. That's correct.

Q However, Pennsylvania Company could undertake financing based on its assets, is that not correct?

A. That's correct.

Q And the proceeds of such financing could be and were later passed up to the Pennsylvania Transportation Company for its use; isn't that correct?

A. That's correct.

Q When it says, therefore, in this memorandum a third source of repayment is the sale of individual investments in Pennsylvania Company, I ask you, Mr. Sullivan, did you know of any reason why, if the management of Penn Central had wanted to sell individual investments, they could not have proceeded to do so at any time?

MR. STITT: I object to the form of the question, your Honor. It involves a written document of some length.

THE COURT: I sustain the objection.

Q In making your credit decision to double your investment in this revolving credit agreement or your exposure in this revolving credit agreement, did you take into account in your own judgment and estimation whether or not the management could, if they wished, or had occasion to at any time sell various individual investments of Pennsylvania Company?

A. Yes, we did.

Q That was something you took into account?

A. That was one of our credit considerations.

Q You understood they would be free to make such sales?

A. They were --

THE COURT: Unless they were already pledged.

Q To the extent that they were not pledged under some instrument?

A. That's correct.

MR. PIEL: I call your Honor's attention to the fact that the offering circular in December of

Pennsylvania Company does list which ones were and were not pledged.

Q At the end of this memorandum there are some remarks by Mr. Bevan and Mr. Shaffer appreciative of your assistance to the railroad, and it winds up by saying, "They did hope we would stand by to take a larger share of the credit if other participants were unable to take their portions. We have said that we were willing to do so."

Would you tell us briefly what the basis was for your being willing to do so?

A. First of all, we were satisfied with the credit.

Secondly, we thought that a larger share would be more representative of the relationship that the railroad maintained with Manufacturers Hanover.

Q Could I ask you if that means that it was a matter of prestige to have a larger share in the financing of a company like Penn Central?

MR. STITT: I object to the form of that question. Leading and suggestive.

THE COURT: Overruled.

A. There is an element of prestige in whether you rank amongst the first tier, second tier or third tier of a company's banks.

Q Is that particularly important with respect to companies that are well regarded as credit by banks generally?

A. Yes, that's true.

Q. Am I correct, and correct me if I am wrong, I am just trying to save time by this form of question, was First National City Bank called the leading bank on the revolving credit agreement?

A. Yes, it was.

Q. Does that mean that they took the initiative of arranging it and inviting other banks to participate?

A. It means that they act as agent for the other banks in fulfilling certain duties required under a revolving credit.

Q. From your general knowledge, look again, if you will, at the participants in the revolver. It is attached to that memorandum.

From your knowledge and experience over the years in participating in such agreements with other banks, and I take it you have done that a number of times?

A. Yes, we have.

Q. Does each and every one of those banks make the kind of a credit study and investigation that you make or do some of them rely on the leaders in the group to have exercised sound judgment about worth and credit?

A. I don't think it is possible for me to generalize about a list of banks as long as this.

Q And I don't mean these particular banks. I am talking about in general, what generally happens in that regard when you put together, if I may call it, a syndicate of many banks who participate in a loan.

A. If the syndicate is made up of large and fairly sophisticated banks, there would be a credit analysis done by each of those banks on their own, without relying on the judgment of the lead bank.

Q What about smaller banks that participate?

A. In many cases smaller banks, because of a lack of expertise or staff or because of confidence in other members of the group, will rely on the judgments of the lead bank or banks in the credit --

Q Briefly, with regard to the unsecured loan that Manufacturers Hanover made to Penn Central Transportation Company --

MR. STITT: May we fix the date, please?

Q -- originally in the amount of $13 million sometime in 1968, renewed for $10 million in April 1969 and then again renewed for $7-1/2 million in December of 1969 -- is that right?

A. Yes. I am not -- I don't recall the exact dates, but the amounts are correct.

Q Do you recall that the last time it was renewed was in December of 1969?

A. That's correct.

Q And you renewed it for what period?

A. For a six-month period.

Q To June 30, 1970?

A. Yes.

Q At what rate?

A. At the prime rate.

Q When you did that, the loan was due and payable, wasn't it, in December 1969?

A. Yes, it was.

Q They paid down $2-1/2 million of it and you gave them a renewed loan for the balance?

A. That's correct.

Q Did you at that time make any special credit analysis or special study different from your usual practice of simply following the information as it comes out in the manuals?

A. No, we relied on the credit information that was available in the bank and the regular review of the railroad's condition. That was done by the bank.

Q Now we come to the bridge loan, and I show you Defendants' Exhibit AD for identification. This appears to be a memorandum dated February 5, 1970 by one Edward A. Jones.

Who is Mr. Jones?

A. He is an officer of the bank who reported to me.

Q Is this document like Exhibit BD the same kind of a memorandum as your memorandum of March 12, 1969 in reference to the records of the bank?

A. Yes, it's a memorandum for the file.

MR. PIEL: I offer it in evidence.

MR. STITT: No objection, your Honor.

xxx (Defendants' Exhibit AD was received in evidence.)

Q While you hold that before you, if you will, for a moment, Mr. Sullivan, I am coming back to it, but first I want to show you Defendants' Exhibit AA for identification. There is a date on the lower left-hand corner that is almost obliterated on my copy, but I think it says January 28, 1970.

Do you see that?

A. It is obliterated on mine.

MR. PIEL: It is on the lower left-hand corner, your Honor, it is a bad reproduction --

THE COURT: Not on my paper.

MR. PIEL: We will have to reproduce it again, your Honor.

THE COURT: I will take your representation as to the date.

MR. PIEL: It does show on my copy enough to read.

THE COURT: What is it?

MR. PIEL: You should write in the lower left-hand corner, to make it complete, January 28, 1970.

Q On the last page of Exhibit AD, Mr. Jones' memorandum, there is a sentence in the middle of the paragraph, "We were provided with a sources and application of funds for the transportation company for the past year and their estimates for 1970."

Do you see that?

A. Is this on Page 2?

Q Page 3, the last paragraph, about the middle of the paragraph.

A. Yes, I see it.

Q Can you tell us if Exhibit AA for identification is that sources and application of funds statement?

A. Yes, I believe it was.

MR. PIEL: I offer it in evidence.

THE COURT: Any objection?

MR. STITT: No objection on the testimony of this witness.

xxx (Defendants' Exhibit AA was received in evidence.)

Q Was this a meeting which considered whether or not you and other banks would participate in the so-called bridge loan?

A. Yes, it was.

Q And you did take the participation, as we have seen.

A. Yes, we did.

Q Were you involved in that decision?

A. I was.

Q Mr. Jones reported to you and informed you by this memorandum of what was learned at the meeting; is that correct?

A. That's correct.

Q With that information and other information at your disposal, you ultimately came to the conclusion that Manufacturers should participate to the extent of $10 million, is that right?

A. Yes, it is.

Q Again, if you will look at Exhibit AA, sources and application of funds statement that the railroad financial officer presented in connection with their request for this bridge loan, would you tell the Court what, if any, significance this information had for you contributing to your decision to participate to the extent of $10 million? If you look at AA, it's the one I am asking you about.

A. This shows us generally the expected tight cash position of the railroad itself during the year 1970. It shows the cash position declining to $50 million and the need for $225 million of equipment and other financing during the year to provide for the capital expenditure program and heavy debt maturities during the year.

Q If you look at the top line, you said this showed -- excuse me. I am thinking of the other exhibit.

The last column shows us the actual results at least to the extent that they were available on this date of the 1969 cash flow?

A. Yes, it does.

Q And it shows on the top line, does it not, that Penn Central Transportation Company had suffered a net loss on the income line of $56 million the year before?

A. Yes.

Q And that it was projecting the same figure for now starting year of 1970?

A. That's correct.

Q Again, at this time, did you perform in the bank any special study or analysis or was it a matter of relying on a regular update of your ongoing consideration of it?

A. At this time we did examine more closely the Pennsylvania Company.

Q To whom you were making this bridge loan?

A. Which was to be the borrower of the $50 million, and satisfied outselves as to its creditworthiness.

Q In connection with the presentation made here to your associate, Mr. Jones, and the representatives of other participating banks by Mr. Bevan and the people who came with him as shown in this memorandum, the statements that they made and this document that they furnished, did you or anyone at your direction ask them for underlying documentation of any kind to back this up or prove it?

MR. STITT: Your Honor, the only trouble I have with the question is a reference to statements at a meeting which this witness did not attend.

MR. PIEL: I am asking whether he or anyone at his direction, anyone to his knowledge in the bank, Manufacturers Hanover, working under him, the responsible officer for this matter, asked the Penn Central financial officers to back up the statements they made at the meeting and by way of Exhibit AA through furnishing underlying documentation to prove it.

A. My recollection is that we did not ask for any additional documentation.

Q. Who were the certified public accountants, if you recall?

A. I believe Peat, Marwick was on the books.

Q. Did you call up Peat, Marwick and say, "Are you sure they have those receivables"?

A. No.

Q. You relied on Peat, Marwick's certification of the financial statements?

A. Yes, we would have.

THE COURT: Is this a good time to suspend for lunch, Mr. Piel?

MR. PIEL: Yes, your Honor.

THE COURT: 2:15.

(Luncheon recess.)

AFTERNOON SESSION

2:20 P.M.

JOHN J. SULLIVAN, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. PIEL:

Q We were speaking, Mr. Sullivan, of the bridge loan arranged in February 1970, the purpose and intention of which was to tide the company over toward public financing which it was planning for the springtime; is that right?

A That's correct.

Q Was the bridge loan a loan for commitment for a specific length of time?

A Yes, it was.

Q What was it?

A It was until the Pennsylvania Company sold the debentures or four months, whichever was earlier.

Q At the time in February when you were considering that commitment to the bridge loan, what were your expectations with regard to the long-term financing to come in the spring?

A We expected that the Pennsylvania Company would be able to sell its obligation and that the bridge loan --

THE COURT: When you say their obligation, you mean the debentures?

THE WITNESS: The debentures, yes, sir.

A. (Continuing) -- and that the bridge loan would be repaid from the proceeds of that successful sale.

Q In fact, that public financing did not take place?

A. That's correct.

Q What was the state of the market in the spring?

A. It was a very disturbed market, as I recall. Interest rates were rising, money was very tight.

Q Were there a number of security issues called off in the spring or indefinitely postponed?

A. I don't recall other issues being postponed.

Q Again, as we saw in the March 12 memorandum --

THE COURT: Do you want to refer to exhibit numbers for ease of identification?

MR. PIEL: Yes, your Honor.

Q That is BD in evidence, we saw there that Mr. Bevan had discussed the company's needs and its plans for how it would meet those needs.

Here again, in this memorandum of Mr. Jones', which is Exhibit AD, he discussed the needs and his plans for meeting them, which we note in reference to the company feels they have a number of options --

MR. STITT: May the record show which company is being referred to?

THE COURT: This is the Pennsylvania Company, isn't it?

MR. PIEL: The paragraph begins, "The Penn Central System forecasts needs for 165 million in capital expenditure" --

THE COURT: Exhibit BD?

MR. PIEL: No, that is AD. BD was March.

I am calling attention to the fact that there was a similar discussion as in March, the same type of topics were covered.

THE COURT: You are referring now to the second full paragraph?

MR. PIEL: Yes, your Honor. I am calling the witness' attention to references to a prospective $1 million debenture issue with warrants for the purchase --

THE COURT: You are leaving off the zeros, too. $100 million debentures.

MR. PIEL: I beg your pardon, your Honor, yes.

Q An additional $50 million to be raised by some other method, the feeling of the company that they had a number of options open, timing of the planned debenture issue and reference to First Boston Corporation and Glore-Forgan as heading the prospective underwriting.

Will you please tell the Court who First Boston Corporation and Glor-Forgan were?

A. They are investment bankers.

Q. What is their standing in the financial community?

THE COURT: Was their standing. Glor-Forgan doesn't exist any more.

Q. What was their standing in 1970?

A. Excellent standing.

Q. Skipping a paragraph, Mr. Bevan also outlined additional financing plans but made reference to the fact that the Pittsburgh and Lake Erie had no bonded debt on its balance sheet, and so on.

At the time that these proposals and plans were reported to you by Mr. Jones and you had them under consideration in connection with participating in the bridge loan, what was your judgment as to whether these proposals and plans were feasible and realistic?

A. We decided that there would be a source of repayment for the bridge loan and that it was reasonable to expect successful sale of the $100 million debenture offering, or if that was not successful that there were alternate sources of cash to the company for repayment.

Q. You, therefore, considered that your participation in the loan would be a prudent thing to do?

A. That's correct.

Q. In the paragraph that we skipped, which is the third paragraph on the first page, there is a reference to Mr. Pat Bowditch.

Who is he?

A. He is an officer or was an officer of First National City Bank.

Q. I should have said was. We are talking about the time of this memorandum. He indicated privately to someone else than Mr. Jones that he would suggest that the company seek the funds in the Euro-dollar market. This phrase reoccurs, and there is a Euro-dollar loan to Penn Central here. I wish you would explain to the Court what the significance of that is.

What is the difference between a dollar loan and a Euro-dollar loan, how does it work and why do they resort to the Euro-dollar market?

A. Well, they are both dollar loans. The source of the money is the difference. A domestic loan would be from domestic sources. A Euro-dollar loan would be from banks, American or European, who have dollars on deposit overseas.

The Euro-dollar market in 1969 was a source of financing for many companies, including the Penn Central. Mr. Bevan sought to tap various sources of funds and the Euro-dollar market was first tapped for the $50 million loan in which our bank had a $3 million participation.

The reference to Mr. Bowditch's comment here indicates he thought that that market, that Euro-dollar market, would serve better as a source of funds for the Penn Central than the banks domestically which are under pressure because of the high loan to deposit ratio of most banks at that time.

Q In other words, the loans to deposit ratios were easier in the European Euro-dollar market?

A. That is correct.

Q You have said that when you were making this loan you knew that the proceeds of it were to go to the use of the Penn Central Transportation Company.

A. That's correct.

Q At the time of the making of that loan, had anything come to your attention, in February 1970, that is, had anything come to your attention that suggested to you that before the year was over Penn Central Transportation Company might file for reorganization?

A. No.

Q If you had any such information, would you have made the loan to the Pennsylvania Company?

A. No, we would not have.

Q As to the personnel of the railroad, you knew Mr. Bevan?

A. Yes.

Q Mr. O'Herron?

A. Yes.

Q Mr. Loder?

A. Yes.

Q You have told us that in any consideration of a credit, particularly a new credit, I think you indicated, one of the things you do is examine into the history and background of the management to get some kind of an appraisal of the kind of people they are.

A. That's correct.

Q You did that in respect of the people who were in the management of Penn Central?

A. Yes, we did.

Q Did you arrive at a judgment and opinion about the quality and character of these men for integrity and ability?

A. We considered the ones you mentioned as capable, capable financial people.

Q Did you know their reputations for integrity and ability?

A. They had excellent reputations for ability and integrity.

Q What were their reputations?

A. Excellent.

Q Did you mean that you didn't try to appraise their integrity yourself, you judged their ability, is that what you meant, in defining your answer?

A. No, by my answer I meant that from their background and actions and from their dealings with our bank, we considered them to be eminently qualified for the job that they were doing.

Q Did you have anything come to your attention that made you question their integrity?

A. Not at that time.

Q Did anything come to your attention that made you question their integrity at any time before March 16, 1970?

A. No.

Q Was your understanding of the character and reputation of Messrs. Bevan and O'Herron a factor in your analysis leading up to your recommendation to participate in this bridge loan?

A. Yes, it was.

Q In what respect? Why was that important?

A. Because of the statements that Mr. Bevan made at meetings, such as the meeting described in the memo of February 5, and his analysis of the operating condition of the railroad and steps that were being taken to return it to profitability. We considered his judgment an important factor in the future course of the railroad.

Q Will you state for the Court, please, what is meant by the term "line of credit"?

A. The line of credit is an availability, a facility available from a bank to a borrower, to lend usually during the coming year and usually for current needs.

Q As a matter of custom and practice, does such a letter contain any conditions?

A. In our bank we state that the line of credit is subject to our satisfaction with the financial condition of the borrower.

Q Your continuing satisfaction?

A. Our continuing satisfaction.

Q I show you Exhibit FG for identification and ask you if that is a typical form of letter of credit letter in your bank?

MR. STITT: If your Honor please, this document --

Q Line of credit letter in your bank.

MR. STITT: This document is dated 1974. We are talking about events that occurred back in 1970, and with respect to commitments by banks involved in lines of credit other than Manufacturers Trust Company. I do question the relevance of this document.

MR. PIEL: May I reframe my question?

Q Is this a form of letter which was in use by your bank in 1959 and 1960 to extend a line of credit to a customer?

A. I am not sure that it was in use in 1959 and 1960.

Q Excuse me. If I said 1959 and 1960, I meant 1969 and 1970.

A. It is not a form letter in that it must be used for every line of credit granted. It is, however, the type of letter that was in use in 1969 and 1970.

Q Namely containing some expression to the effect that it is subject to the usual condition that Manufacturers Hanover will continue to be satisfied with the financial affairs of the company?

A. Yes.

MR. STITT: Objection to the question as leading.

THE COURT: Overruled.

Q Is that correct?

A. That's correct.

Q When you define line of credit to refer to that kind of an extension of a facility, is that generally true among lending commercial banks?

A. Yes, yes.

Q If you will look again, please, at Exhibit BC, the list that Mr. Sullivan told us about this morning showing the participants in various loans, you told us about your extending an unsecured loan for six months in December, $7-1/2 million.

Does that appear on this chart in the column called "Other Loans" under "Unsecured"?

A. Yes, it does.

Q To the left of that, three columns over, is another column headed "Unsecured Bank Lines." If you will turn to the third page, you will see that that column totals $46.5 million.

Can you tell us, from your familiarity with the affairs of the company at the time, what that represents?

A. The unsecured bank loans?

Q Yes.

A. Those were the loans that were outstanding at this period, which was in early June of 1970, if my recollection is correct, loans that were taken down under lines of credit made available by these banks. It was my understanding they were made available initially as backup for the commercial paper of Penn Central.

Q Were they called stand-by lines at that time?

A That's correct.

Q Did there come a time when part of those lines was converted into swing lines, if you know?

A I don't know that they were called swing lines.

Q Demand lines?

A Again, I don't know what type of note was used by those banks.

Q All right. We will come in to that later with another witness.

You said it was originally $50 million?

A It was my understanding that the railroad had available $50 million in bank lines as backup for commercial paper.

Q And that at some point it took down actual loans under those lines, is that correct?

A Yes.

Q To the extent of 46.5?

A That's my understanding.

Q Did any of the banks who were participants in that stand-by line decline to honor the line?

A. It was my understanding that some banks did decline to lend.

MR. STITT: I object to testimony about this witness' understanding, your Honor.

THE COURT: Sustained.

MR. STITT: Either he has personal knowledge or he doesn't.

Q Did you know at the time, Mr. Sullivan?

A. I was told that banks declined to lend --

MR. STITT: Objection to what he was told.

THE COURT: Sustained.

Q Did Manufacturers Hanover, among its services to clients, purchase commercial paper for clients?

A. Yes, we did.

Q Did it make recommendations to clients with regard to the purchase of commercial paper?

A. I would like you to clarify the word recommendations.

Q Let me ask you to clarify it by telling us what you did with respect to assisting clients to purchase commercial paper.

A. We had what we call a short-term investment center at which we made available quotes on commercial paper and other short-term securities for customers that wished to invest money on a temporary basis.

Q Did Manufacturers Hanover also purchase commercial paper for its own account or were all of its purchases for clients, if you know?

A. To my knowledge, we did not purchase for our own account.

Q Did you purchase Penn Central commercial paper for account of clients?

MR. STITT: May we fix the date, your Honor, and the corporation?

MR. PIEL: All right. There is only one corporation that issued the notes, Mr. Stitt, and we all know which one it was. It was called Penn Central Company at one time and on October 1, 1969 changed its name to Penn Central Transportation Company, the only issuer of commercial paper notes that I know of that had Penn Central in its name.

MR. STITT: I would like to have the time fixed as to when these purchases were made. Otherwise, I don't see any relevance.

Q In 1970 were purchases made by Manufacturers Hanover for clients of Penn Central commercial paper?

A. Yes, I understand that we did purchase for account of others.

MR. PIEL: Your Honor, Exhibit CU shows a purchase by Manufacturers Hanover as late as April 7, 1970. That's the master computer run of transactions.

Q I show you Exhibit FF for identification and ask you what that is. We have awfully illegible copies. The top line says "Commercial Paper List, Account Officer, Dealer," on the left it says "Name."

A. This is a list that the bank prepared for internal purposes for the guidance of the people in our short-term investment center. It is a list of commercial paper issuers. The category has a certain meaning.

The account officer is the officer that handled that particular relationship, if there was one, and the dealer, I assume, is the investment banker that was issuing the paper.

Q Or was selling the paper in the short-term market?

A. Yes.

Q Is this what is commonly called an approved list?

A. It has had a number of names over the years. At one time it was called an approved list of commercial paper issuers.

Q We have apparently four categories.

Will you tell us what they were in 1969 and 1970?

A. The meaning of the categories changed a number of times. I can't tell you without reference to some help what exactly was the meaning in '69 and '70 as to categories I think three and four.

Category 1 had the same meaning I think through the period '69 to the present, which meant that the paper is eligible for purchase in unlimited amounts for customers.

Q Number 2? When you say available for, you mean is approved for?

A. Is approved for purchase in unlimited amounts.

Two, I believe at this time had the meaning, approved for purchase in limited amounts.

Q Three and four you say you have difficulty recalling?

A. The meaning changed. At times it meant approved for purchase only after consultation with the account officer.

Q And on Page 4 we see that Penn Central Co., the issuer, Penn Central commercial paper by whatever name known from time to time was in Category 1?

A. Yes.

Q. Was it ever removed from Category 1 before June 1970?

A. No, it was not.

THE COURT: This is your bank's list?

THE WITNESS: Yes, your Honor.

MR. PIEL: I offer it in evidence.

MR. STITT: Objection solely as to relevance, your Honor.

THE COURT: What is irrelevant about it?

MR. STITT: We don't know what this bank was told by -- I will withdraw the objection, your Honor.

xxx (Defendants' Exhibit FF was received in evidence.)

MR. PIEL: Your witness.

CROSS EXAMINATION

BY MR. STITT:

Q. You testified that this bridge loan was negotiated in early February 1970.

A. Yes.

Q. In agreeing to participate in that loan, I take it you had no discussion with Goldman, Sachs.

A. That's correct.

Q. You had no way of knowing and you did not know what Goldman, Sachs knew about Penn Central Transportation or the Pennsylvania Company at that time, did you?

A. That's correct.

Q And you had no idea what Goldman, Sachs told or did not tell its commercial paper purchasers as of March 16, 1970?

A. That's correct.

MR. PIEL: May I have the question?

THE COURT: The witness did not know what Goldman, Sachs told its customer in relation to the sale of Penn Central commercial paper.

THE WITNESS: That's correct.

Q This was a bridge loan not to Penn Central Transportation Company, the issuer of the paper, but rather to the Pennsylvania Company, a subsidiary?

A. Yes.

THE COURT: What difference does that make?

MR. STITT: The difference, your Honor, we contend, is that the railroad was already loaned up at this time and --

THE COURT: Everybody knows the money was going upstream.

Q You mentioned the First National City Bank.

A. Yes.

Q I believe you testified that they were the lead bank in the $300 million revolving loan that was negotiated or extended and negotiated in or about April 1969?

A. Yes.

Q And this was a secured loan, was it not?

A. Yes.

Q And the security was the stock of the Pennsylvania Company?

A. That's correct.

Q In addition to that stock, was there a negative pledge agreement as part of the loan package? You may refer, if you want, to your memorandum of March 12, 1969. I direct your attention to the third paragraph. Does that refresh your recollection?

A. Yes, it does. I believe that the negative pledge remained in the terms of the agreement.

THE COURT: What is meant by negative pledge?

THE WITNESS: The transportation company agreed not to pledge the stock of the Penndel Company, the P & LE Railroad Company and the Pittsburgh, Fort Wayne and Chicago Railway Company to secure the other obligations.

THE COURT: But they weren't pledged with you to secure this?

THE WITNESS: That's true, they weren't pledged.

Q So they were sort of restricted as to their future use?

A. Yes.

Q First National City as lead bank was in the $300 million revolver for $92 million?

A. That was their gross participation. It was my understanding that they participated part of that out to other banks.

Q But in this transaction, that's what they were representing, 92 million?

A. I believe so, yes.

Q Is that your recollection?

A. My recollection is that their gross participation was $92 million.

Q Yours was 20 million, I take it?

A. That's correct.

Q As such was First National City the lead bank in this transaction?

A. Yes.

Q Was First National City also involved in this Euro-dollar revolving credit?

A. Yes, they were.

Q When was this negotiated?

A. I don't recall.

Q Sometime during 1969?

A. Either early '69 or possibly late '68.

Q And their participation was about $16 million?

A. I don't know.

Q Does this document refresh your recollection?
I show you Exhibit A-13.

A. It shows them as having $16 million --

Q And your participation was --

A. Our bank had a $3 million participation.

Q As lead bank in a transaction such as this amounting to $300 million on the one hand and $50 million on the other, what are the duties of the lead bank? What is expected of you?

A. Well, the obligations vary with the credit. The main obligation is to prepare a loan agreement and to negotiate the terms of it with the borrower to the satisfaction of the participating banks.

Q They are expected to make a rather thorough initial credit investigation, are they not?

A. No, they are under no obligation to do that, so far as the other banks are concerned.

Q But aren't they expected to do that, apart from obligations?

A. They are expected to be prudent in their knowledge of the affairs of the borrower.

Q And they conduct the negotiations?

A. Towards the loan agreement, yes.

Q Yes.

A. Yes.

Q And arrange for the proper collateral?

A. That would be one of the factors in the negotiation.

Q And since this loan is to continue on a revolving basis -- for how many years, five, six years?

A. The term of the loan ran into '76 is my recollection.

Q Would they be expected to maintain contact with the borrower throughout the term of this loan?

A. Yes, they would.

Q Would they be expected to keep on top of the borrower's affairs throughout the life of this loan?

A. Yes.

Q Who was the lead bank in this bridge loan of February 1970, early February?

A. The Chemical Bank.

Q Did First National City participate in this bridge loan?

A. No, they did not.

Q Were they asked to participate?

A. It is my understanding that they were.

Q You didn't know that at the time, did you?

A. At what time do you mean?

Q When you committed Manufacturers' money to this transaction, did you know that First National City had been invited to participate but declined the invitation?

A. I did not know it at the time we made our decision.

Q You learned about it subsequently?

A. That is correct.

Q I believe you testified on direct that the proceeds of this bridge loan were going upstream.

A. Yes.

Q Were these upstream proceeds earmarked or segregated for any particular purpose?

A. Not that I am aware of.

Q Just to be used as general funds of the company, of Penn Central Transportation?

A. Yes. That was my understanding.

Q Not to be segregated for the protection of the holders of the commercial paper?

A. That's correct.

Q You didn't attend this meeting that Mr. Jones wrote up under date of February 5, 1970?

A. No, I did not.

Q. So you don't know what discussions may have taken place with Mr. Bevan at that meeting, apart from what is set forth in this memorandum, Exhibit AD?

A. That's correct, and what he may have told me subsequent to the memo.

Q. Were you told anything subsequent in some other memorandum?

A. Not that I recall at this time.

Q. You have reviewed your file before coming here, of course?

A. I am sorry?

Q. You have reviewed your file before coming here?

A. I am sorry, I don't understand the question.

Q. Have you reviewed your file before coming to this court to testify?

A. No, I did not review it today.

Q. Did you review it at any date in connection with your testimony?

A. No, I did not.

Q. You mentioned, as I gather this was a four-month commitment under this bridge loan?

A. That's my recollection, yes.

Q And at the inception it was unsecured?

MR. PIEL: I am sorry, I can't hear you. I would like to follow this.

Q At the inception, it was unsecured?

A. Yes.

Q That was because you were anticipating a $100 million bond issue by the Pennsylvania Company in May?

A. That's correct.

Q Again, we are talking about the Pennsylvania Company and not Penn Central Transportation?

A. Yes.

Q I believe you testified that that bond issue did not go through.

A. Yes.

Q And I believe you mentioned high interest rates and tight money.

A. In connection with general market conditions I mentioned those factors.

Q I ask you, would you give us the facts as you know them as to why that bond issue didn't go through?

A. It is my recollection that the first-quarter earnings of the Penn Central Transportation Company were released before the intended sale.

Q They were released on or about April 23, 19--

MR. PIEL: 22, I think it was.

Q I show you Defendants' Exhibit EH for identification.

Does that refresh your recollection as to the release and publication of those earnings?

A. Yes.

Q When were they released and published?

A. This is dated April 23, the news story.

Q Continue.

A. The loss reported plus market conditions motivated the underwriters to withdraw from the sale of the issue.

Q Thereafter was there a run-off in the commercial paper?

A. I am not positive of the relationship of the timing. There was a run-off in commercial paper. My recollection is that it occurred sometime in late April or early May.

Q After the publication of these earnings on or about April 23?

A. That would be correct, yes.

Q Did you buy any commercial paper of Penn Central Transportation after this earnings information was published on April 23?

A. Did I personally?

Q You personally or for any client.

THE COURT: Your bank, is what he is worried about.

A. I don't know whether the bank did or not.

Q You didn't buy for any client?

A. I didn't, no.

Q Did you handle this purchase on April 7, 1970 that Mr. Piel mentioned that is recorded in the computer printout, Exhibit CU?

A. Was that the purchase of commercial paper?

Q Yes.

A. No.

Q So you don't know what might have been reviewed or what might not have been reviewed by the bank before making that purchase?

A. No, I am not familiar with it.

Q Just as a matter of interest, did the purchaser collect or was the purchaser stuck?

A. I don't know.

MR. PIEL: May I have the question read --

THE COURT: Did the purchaser collect or was he stuck. The witness says he doesn't know.

Q So you don't know how long a term that purchase may have been on April 7, do you?

A. No.

MR. PIEL: Exhibit CU will show.

Q With regard to this bridge loan, did you have any anticipation as to whether or not collateral would be available if for some reason, either market conditions or the bond issue projected for May did not go through?

A. We had no firm understanding, no firm agreement with the Pennsylvania Company that they would provide collateral in the event that the sale did not occur.

We had, however, at Manufacturers Hanover decided that if there was no sale of public issue we would require collateral at the end of the four-month period.

Q When did you make that decision?

A. At the time we committed for the loan.

Q Was that decision made known to the Penn Central officials?

A. To whom?

Q Was that made known to the Penn Central officials or did you just keep it amongst yourselves at the bank?

A. I believe we told Dave Bevan.

Q That is your best recollection?

A. Yes.

MR. STITT: Your Honor, I have no further questions of this witness.

Thank you, Mr. Sullivan.

THE COURT: Mr. Sullivan, this bridge loan had a number of participants. I gather that none of them had any collateral for the bridge loan at the time it was executed.

THE WITNESS: That's correct.

THE COURT: When you say you made known to Mr. Bevan at the time of the execution of the agreement for the bridge loan that you would require collateral if the debentures were not sold, did the other participants notify him of the same thing?

THE WITNESS: I don't know, your Honor. None of them informed us of that fact.

THE COURT: Was that part of the -- Chemical was the so-called lead bank.

Did they take care of such a provision?

THE WITNESS: Not necessarily. There was a small group of participants in that particular loan, and David Bevan negotiated the arrangement with each of the participants individually. We were requested to participate in that loan by the railroad treasury officials rather than by the Chemical Bank, and we negotiated with them.

REDIRECT EXAMINATION

BY MR. PIEL:

Q Let me be clear about this, Mr. Sullivan, and see if I am.

At the time the bridge loan was made in February, you did not at that time have any collateral put up, did you?

A. That's correct.

Q You didn't have any agreement to have any collateral put up, did you?

A. That's correct.

Q You simply had the intention that in the event that the public financing didn't take place and the loan came due, that you would require collateral before you renewed it for a further period?

A. That's correct.

Q Do you know what the total lending of First National City Bank was to the Penn Central System?

A. No, I am afraid I don't.

Q Do you know what the First National City Bank's lending limit was for Penn Central?

A. No, I do not.

Q Will you tell the Court what a lending limit is?

THE COURT; I think the Court is aware of that.

Q Do you know what percent of First National City Bank's lending limit had been taken up by the loans that it did make to Penn Central?

A. No, I do not.

Q Or what comparison that was when -- what magnitude that was when compared with the proportion of loans to lending limits to its other big accounts?

A. No, I do not.

Q And this was a time of tight money?

A. Yes, it was.

Q I think Mr. Stitt failed to elicit any recollections from you as to whether you knew about that at the time and that you were now rather under an impression that you heard about it later.

A. I am sorry, I don't understand the --

Q The First National City Bank --

THE COURT: He testified that he did not know at the time of the bridge loan's execution or arrangements --

THE WITNESS: Commitment.

THE COURT: -- or commitment that First National had declined to participate. That's his testimony.

Q May I show you, please, Defendants' Exhibit ET for identification.

MR. STITT: May I see a copy, please?

MR. PIEL: Mr. Stitt, we gave you a complete set of copies of all of our designated exhibits.

Give him another one, please, Mr. Dorkey.

MR. STITT: Thank you very much.

Q Is this document dated February 11, 1970 another one of these recording memoranda by Mr. Jones who reported to you?

A Yes, it is.

Q In the middle of the second paragraph I call your attention to the statement, "Mr. Bevan indicated that he considers our bank one of their prime banks and he has always tried to give us more than fair treatment with balances. This fact was acknowledged by Messrs. Hanna and Sullivan" --

MR. STITT: If your Honor please, is this document going to be offered in evidence?

MR. PIEL: I offer it in evidence.

MR. STITT: No objection.

xxx (Defendants' Exhibit ET was received in evidence.)

Q Preliminary to a question, I call your attention to that statement that I read, and the next sentence, "This fact was acknowledged by Messrs. Hanna and Sullivan."

Is the Sullivan referred to you, Mr. Sullivan?

A Yes, it is.

Q Who is Mr. Hanna?

A Mr. Hanna was my superior at the time, Paul J. Hanna.

Q What was his position?

A He was a senior vice president of the bank.

Q Is there one senior vice president?

A No, there are many.

Q What was his area of responsibility?

A He was in charge of the Northeastern States as part of the National Division.

Q "Bevan added that not all of Penn Central's banks enjoyed this kind of experience. Mr. Bevan spent some time discussing his company's relationship with First National City Bank, adding that First National City had declined to participate in this 50 million short-term credit. He expressed his disappointment with their reaction. After Mr. Bevan's presentation, Mr. McGillicuddy" -- who is he?

A Mr. McGillicuddy is the president of the bank now. I believe he was an executive vice president at that time.

Q Was he a superior of you and Mr. Hanna?

A Yes, he was.

Q "Mr. McGillicuddy agreed to accede to Mr. Bevan's request and lend Pennsylvania Company 10 million on a short-term note unsecured at the prime rate. The take down would be in one to three installments from the middle of February to the middle of March."

Does that refresh your recollection now, Mr. Sullivan, that you did indeed know from Mr. Bevan himself about First National City Bank declining?

A. Yes, it does.

Q And he didn't tell you what their business or other reason might have been, did he?

A. He did not tell us the reason why they declined.

Q I also want to show you Defendants' Exhibit AL, a record memorandum regarding Penn Central Company, appearing to be from the files of the First National City Bank.

I am not going to ask you to read the whole thing. I want you to turn to Page 2. You see in the middle of the page above the date February 9, 1970 the words "Patrick F. Bowditch, Vice President," three places on that page there are typed -- two other places there are PFB and then there is a signed initial.

MR. STITT: If your Honor please, if this is another document that is being read from, perhaps it ought to be offered in evidence.

MR. PIEL: I am not reading it.

Q I am asking him whether he can by any chance from his dealings with the First National City Bank and Mr. Bowditch he recognizes that manner of initialed signature as being the signature of Mr. Bowditch.

A I am unfamiliar with the signature of Mr. Bowditch.

Q I want you please now to read the P.S., read it to yourself, not out loud.

(Pause)

A Yes, I have read it.

Q Does that by any chance refresh your recollection that you learned at some point or other that First National City Bank expressed a willingness to go along on the bridge loan if requested?

A No, I was never aware of that.

MR. PIEL: I think it is too peripheral, your Honor, for me to call Mr. Bowditch.

THE COURT: I agree.

MR. PIEL: That's all, your Honor.

RECROSS EXAMINATION

BY MR. STITT:

Q Mr. Sullivan, I am just going to draw your attention to these questions and answers that you gave at the Welch trial, Page 2397:

"Q Isn't it a fact that the First National City Bank refused to participate in the bridge loan?

"A They did not participate.

"Q You knew at the time that they had declined to participate?

"A No, I did not know at that time."

Did you give that testimony?

A Yes, I did.

Q Is that still your testimony?

A Perhaps some clarification would --

THE COURT: Was this document, ET, shown to the witness at the Welch trial?

MR. PIEL: I don't think so, your Honor. We had such a blizzard of papers, I don't believe I showed it to him and I don't believe I knew it existed at that time. See, it didn't come from Manufacturers Hanover.

THE COURT: First of all, it is a lot of wasted time as far as I am concerned in this trial.

Secondly, I can't draw any inference that because they didn't originally participate, there was something wrong with Penn Central. I wouldn't draw that conclusion. So, we will stop it.

MR. PIEL: I have one more question, if I may.

REDIRECT EXAMINATION

BY MR. PIEL:

Q I would like to show the witness Plaintiff's Exhibit F-76, 77 and 78 received by your Honor subject to connection. The three of them are alike, so this isn't a big job, I mean alike in form, anyway, three different dates. I will just ask you to note that they are signed by a Mr. Underhill.

Do you know who he was in the employ of the Penn Central System?

A. The name is familiar. I think he may have been the comptroller of the railroad.

Q And each one of these letters is addressed to -- well, it is addressed to Mr. Saunders, the chairman, but with copies to certain others, Mr. Gorman, the president, Bevan, the chief financial officer.

Are the other five known to you?

A. I have met some of them at one time or another.

Q I am not going to tax you with that because we had a witness who identified them and their positions.

Have you ever seen these -- did you ever see these in February 1970 when you were considering the bridge loan?

A. No.

Q Did you ask to be shown any such document?

A. Such as these?

Q Yes.

A. No.

Q What does it appear to you that the document is, not the letter, but the document that has been transmitted in the letter?

MR. STITT: If your Honor please, the witness is now being asked to speculate about a record of Penn Central which he has not seen before, which he did not prepare.

THE COURT: I will sustain that objection.

MR. PIEL: If your Honor please, may I state my purpose?

THE COURT: Yes.

MR. PIEL: That is offered to ask the Court to believe that if Goldman, Sachs had tried to get this information or it had inquired hard enough or often enough, it would have discovered facts in this document.

Here is a man who has dealt with scores and scores of borrowers, corporate borrowers and corporate officers in that connection, and I want to know whether he recognizes this type of internal document and if he can tell us whether this kind of document is ever made available to bankers when they are negotiating loans or whether they get prepared material from the borrower.

THE COURT: I was wondering why Vogel wasn't asked the question. I assume Mr. Wilson is going to testify --

MR. PIEL: That's right, your Honor. Mr. Vogel wasn't at that meeting.

THE COURT: There is no use asking Mr. Levy because he had a peripheral involvement.

MR. PIEL: Mr. Vogel wasn't at the February 6 meeting when these matters were discussed.

THE COURT: The question is, is it usual to ask for it.

MR. PIEL: That's right. We are being held to some kind of a standard that Mr. Stitt has in mind, and I don't know what his standard is, but I am trying to find out what normal and ordinary practice is. I think this is an excellent opportunity to find out.

THE COURT: First of all, are you withdrawing your objection to the introduction of the documents?

MR. PIEL: No, your Honor. Your Honor has received them subject to connection and I am laying the basis for their being excluded.

MR. STITT: I don't believe that's a correct statement of the record, your Honor, and I still say this witness, the question is what Goldman, Sachs could have commanded of Penn Central. This witness was not at the meeting of February 6 and he had not been part of the Goldman, Sachs organization when its relationship with the railroad was going on. I suggest his testimony would be most speculative.

THE COURT: He is a fellow who approves millions of dollars of loans. Don't you think there is a sort of a standard of what you can get if you ask?

I will overrule the objection.

Q Mr. Sullivan, you have heard from my explanation to the Court what my question is, and I will put it to you, first of all I want you to tell us from looking at it what kind of a document it is in terms of the running of a railroad or a corporation.

A. What it seems to be is a weekly report to the top management of the railroad on the current operations of the railroad, comparing them to the financial plan and to the actual results of the year before and setting out any variances from the forecast, the plan and the actual results of the year before.

Q You will note that all three dates are within the first quarter.

A. Yes.

Q. And that each time there is a new report, it changes the guesses, if I may call it that, as to how the first quarter is going to turn out?

A. Right. I would guess that it is an updating of the forecast based on --

Q. Based on some more information?

A. Based on current results, yes.

Q. And subject to whatever else is going to happen before the end of the quarter; isn't that right?

A. That's correct. That's what I would imagine.

Q. That's the way it appears to you.

I ask you, do corporate officers in coming to you to explain their requirements and their plans for meeting them acquaint you with that kind of internal management document?

A. It is very unusual.

THE COURT: Do you ask for such type of information?

THE WITNESS: Your Honor, only when we are in what I would call a workout situation or a credit which shows extreme strain.

Q. A workout situation is where the debt has matured and not been met?

THE COURT: Wait, wait, ask the witness to tell --

MR. PIEL: I was asking.

THE COURT: No, you are making a statement as to what it is. Ask the witness. He is the expert, not you. You are just a lawyer.

MR. PIEL: That's right.

A. A workout situation is a company that is unable to meet maturities as they occur which, of necessity, must then work very closely with its banks to pay off that debt without recourse to a bankruptcy court.

Q. That's the time when you expect to see this kind of document?

A. Yes. We feel we can ask for it, current figures of the most confidential nature, and that there should be no hesitancy on the part of the management to provide them.

Q. Is it the normal course that they present you with whatever figures they are bringing to your attention in order to explain their situation and that they prepare that for you for the purpose of the discussion?

A. I am sorry, I really don't understand the question.

Q. If they are coming to you to discuss their financial requirements and their plans, they come prepared with information to present to you of what they think they should present to you to put you in a position to judge their credit; is that correct?

A. Are you talking generally or about --

Q I am talking generally, as a matter of general practice and experience.

A. Yes, I would have to agree, yes.

THE COURT: I now admit 76, 77 and 78.

MR. PIEL: May I be heard on that, your Honor?

THE COURT: No. You cannot have it both ways, Mr. Piel.

MR. PIEL: Your Honor, I have tried --

THE COURT: I know what you are trying to do, but they are in, so I can now draw a conclusion from the witness' testimony. If they weren't in, I couldn't draw any conclusion from his testimony, I would have to strike his testimony.

MR. PIEL: Very well, your Honor.

THE COURT: Are you finished with him?

MR. PIEL: Yes, your Honor.

MR. STITT: Just a couple.

THE COURT: You are in the middle of one of these typical lawyer deals of who gets the last question.

Go ahead, Mr. Stitt.

RECROSS EXAMINATION

BY MR. STITT:

Q I show you Defendants' Exhibit AA in evidence labeled Penn Central Transportation Source and Application Fund, Exhibit 2.

I also show you Exhibit AD in evidence, the Jones memorandum of February 5, 1970.

I ask you if this is part of the material referred to as being provided by Mr. Bevan on February 5 as indicated at Page 3 of the Jones memo.

A. Because he mentions the $56 million loss, I think that it is.

Q Did Mr. Bevan provide any additional material at that time?

A. Not that I recall.

Q Did you search your files to see if there was any?

MR. PIEL: I can't hear that question.

Q Did you search your files to see if there was any?

A. I have not searched my files for this purpose.

Q I draw your attention to Exhibit BD, your memorandum of March 12, 1969 where the statement is made "The company," referring to Penn Central --

MR. PIEL: The page, please?

Q First page, bottom paragraph, "The company distributed a cash forecast for the year 1969 but does not feel it is in a position to forecast specifically beyond that date."

Was that forecast, in fact, delivered or distributed?

A Is that the March '69 memo?

Q Yes.

A Yes, it was.

THE COURT: That's AA?

MR. PIEL: No. It is attached as part of the same exhibit, your Honor. AA is the one that goes with the February 5 --

Q Is that the last attachment here?

A Yes, that's the source and application of funds.

Q To Exhibit BD.

MR. PIEL: I am sorry if Mr. Stitt is misled by our problem with that document which is AA. That's the one that says January 28, 1970 in the lower left-hand corner.

THE COURT: I gather that was prepared for the bridge loan conference.

MR. PIEL: Right.

MR. STITT: Yes, dated March 12, 1969.

THE COURT: No, no. Exhibit AA is January 28, 1970 prepared for, I gather, the conference referred to in Exhibit AD, the bridge loan conference.

MR. STITT: Correct.

THE COURT: Attached to Exhibit BD is the same type of material for the years '68 and '69 dated March 11, 1969.

MR. STITT: Yes.

THE COURT: I gather the witness says that is the forecast that was discussed at March 12; is that correct?

THE WITNESS: Yes.

BY MR. STITT:

Q That was a cash forecast?

A. Yes.

THE COURT: Yes.

A. (Continuing) And also called a source and application of funds.

MR. STITT: I thank you, Mr. Sullivan.

MR. PIEL: Thank you, Mr. Sullivan.

THE COURT: You are excused.

You are going to let him go now?

MR. PIEL: Yes, sir. I am going to let Mr. Stitt have the last question.

(Witness excused.)

MR. PIEL: I call Mr. Lepley from Philadelphia. I hope we can send him back to Philadelphia by a quarter past four.

THE COURT: Do the best you can.

RAYMOND C. LEPLEY,

called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PIEL:

Q Mr. Lepley, are you employed by the Penn Central Transportation Company?

A. Yes, I am.

Q Which is now under the control of trustees appointed by the Reorganization Court, Judge Fullam, in Philadelphia?

A. Yes, that's correct.

Q What is your current position?

A. I am treasurer of Penn Central Transportation Company.

Q Are you here pursuant to subpoena?

A. Yes, I am.

Q Were you with the Penn Central Transportation Company in '69 and '70?

A. I came to Penn Central in November of 1969 and have been with them ever since.

Q You came from Atlantic Richfield Company.

A. That's correct.

Q Where your experience had been what?

A. Assistant treasurer.

Q What was your position when you came to -- what position did you obtain when you came to Penn Central Transportation?

A. Assistant treasurer.

Q Did your duties include any financials with respect to commercial paper?

A. Yes, they did.

Q Will you explain what your job was in that connection?

A. I was to -- when I first arrived with the company, I was told that I was to administer the relationships between our company and Goldman, Sachs.

Q Was that the principal activity of yours from November 1969 onward?

A. It was one of my principal activities.

Q Who at Goldman, Sachs was your contact for this purpose?

A. I talked mainly with Lou Drypolcher and occasionally with Roger Lynch and George Van Cleave.

Q How often were you in touch with one or another of them?

A Almost daily.

Q By telephone?

A By telephone.

Q Did there come a time in December 1969 when you had a face-to-face personal meeting with them in New York?

A Yes, that's true.

THE COURT: When you say "them," whom do you mean by "them"?

THE WITNESS: We met with Goldman, Sachs' representatives and I believe that George Van Cleave was there and I believe that Roger Lynch was there and one or two other people from Goldman.

Q Can you fix the date?

A Only that it was December 1969.

Q I show you Plaintiff's Exhibit F-63 in evidence which we believe is your handwriting from your files; is that right?

THE COURT: Nobody can read your handwriting. Do you want to read the transcript they made for me?

MR. PIEL: We do have a traced copy, but I was going to ask him to do just that, your Honor, so we have it right.

A. Yes, this is my handwriting and it is dated December 9, 1969, meeting, or, rather --

Q. I might say, I think we will all agree that you need not reproduce the abbreviations. Just give us the word that the abbreviation stands for and dictate a translation of that into the record, please.

A. "GS," Goldman, Sachs, "own $16 million now. Adverse publicity and general market makes longer maturity"-- that should be "makes longer maturity difficult," I think I just left that out. "Swing line desirable for flexibility of at least $15 million. Tell Shaffer we need immediate availability on 15 million. 80 percent coverage is typical. Many have 100 percent." Then it says "Lou Dry," which is Lou Drypolcher.

Q. Who was Shaffer?

A. Shaffer was the treasurer of Penn Central Transportation Company.

Q. Would you tell us what you recall was discussed at that meeting at which you made these notes?

A. We discussed mainly the need for a swing line and perhaps additional backup line coverage.

Q. Did you discuss the matter of excessive inventory?

A. Yes, we discussed excessive inventory, too.

Q. What was said about it?

A The fact that Goldman, Sachs, over periods of time, did have considerable amounts of inventory of our commercial paper and that it was costing them money.

Q Did they explain in what way it was costing them money?

A Yes, that the cost of carrying the inventory, that is the cost of their loans to carry that inventory was greater than the interest rate that they were receiving on the commercial paper, the discount rate.

Q Did they refer to any other kind of cost to them in connection with carrying the inventory?

A I don't remember.

Q Try to refresh your recollection.

Did they talk about the problem of fixed maturities in inventory, unsalable, with the result of notes maturing in inventory?

MR. STITT: If your Honor please, I believe this is leading and suggestive. I object to the form of that question.

THE COURT: He is trying to probe his memory.

Overruled.

Q Do you recall any such discussion?

A I don't remember that particular discussion at that meeting. It came up in telephone conversations.

Q I am going to show you a memorandum that is in Exhibit A in evidence, and it is also Plaintiff's Exhibit F-9. It is what we call in this case a blue sheet memorandum by Mr. Van Cleave already in evidence.

I will ask you if you will kindly read through that.

THE COURT: Is this supposed to be Van Cleave's memo of the same meeting?

MR. PIEL: Yes, your Honor.

Q Have you read it now?

A Yes.

Q Does it bring back anything else to your mind about the conference?

A It brings to mind that they wanted additional backup for our paper to bring us from 50 percent coverage to 100 percent coverage.

Q You mentioned before that apart from that, they wanted swing lines.

A That's right.

Q What did you understand that the difference was between that and backup lines?

A Well, a swing line is available immediately by telephone call whereas a backup line will take a longer period of time.

Q Also, does this comport with your recollection of all the persons who were at the meeting?

A Yes. This refreshes my memory on who was present.

Q I won't ask you to repeat it.

There is a sentence, "There is no question in our minds that all three gentlemen," meaning you gentlemen from Penn Central, "did not want us to carry that much paper and will go back to O'Herron with a recommendation that they set up swing lines."

A That is correct.

Q What was your reason for your being willing to make that recommendation?

A We wanted to make it as easy as possible for Goldman, Sachs to be able to sell our paper because we wanted it outstanding as much as possible.

Q Rather than in their inventory?

A That's right.

Q You see a reference a little further down, "Vogel brought up the subject of line coverage, pointing out that there are now investors that will not buy commercial paper unless there is 100 percent coverage and that although we," Goldman, Sachs, "do not feel 100 percent coverage is necessary, questions are being asked in this regard."

Do you recall that?

A. Yes, I do.

Q Do you recall anything more about it than appears there?

A. No.

Q Do you recall any explanation about this aspect of a marketing problem?

A. No. I just remember that 100 percent coverage, as indicated by Goldman, Sachs, would make it easier to sell our paper.

Q You don't remember at the moment their having said anything about the aging of paper in inventory?

A. I don't remember it having come up in that meeting, but it came up in telephone conversations.

Q Were there other occasions during November or December on which these discussions were had over the telephone to the same effect?

A. Several times the need for swing lines and need for backup coverage were discussed on the telephone.

Q Did you in those discussions -- did they refer to the marketability or salability of paper in inventory of fixed maturities?

A. Yes, they did.

Q What did they explain about that?

A. Well, if they had inventory of our paper of a fixed maturity which did not match the needs of investors that they dealt with, it made it very difficult obviously for them to sell that paper, so they then asked us about the possibility of repurchasing the inventory.

Q Did they refer to the fact that their costs went up under rising rates when the paper sat there in the inventory?

MR. STITT: I object to the form of this question. I think the witness should testify, not my adversary.

THE COURT: He is trying to probe his recollection, Mr. Stitt.

MR. PIEL: I thought I exhausted his unaided recollection and I am trying to probe for a little more.

Q If you recall it, Mr. Lepley.

A. I don't recall that particular point; simply that they told me that it cost them money to hold the inventory.

Q And that the paper in inventory often didn't have the correct maturity that investors wanted?

A. That's correct.

Q Do you know whether Penn Central had a policy with respect to obtaining or converting backup lines to swing lines during that period of November and December?

92.

A. Well, our policy was to try it when we realized that it would be desirable from the standpoint of marketing our paper.

Q You made a policy decision to try it?

A. That's correct.

Q I am going to show you a group of papers that are marked Defendants' Exhibit BI for identification.

MR. STITT: Which I will hand to my adversary, your Honor.

Q I call your attention to the fact that these seem to be arranged in inverse date order; is that right? Is the earliest date at the bottom?

A. Yes, they seem to be.

Q The dates that are written on these sheets run from December 15, 1969, Monday, to, in this bundle, Monday, May 25, 1970; is that correct?

A. That's correct.

Q What is this record?

A. Well, although it is labeled a weekly summary, it is a daily summary of transactions between the company and Goldman, Sachs with respect to the sale of our commercial paper and it also contains various notations that were of interest to me and/or to both of us at the bottom.

Q To whom?

A. To either me or to both Goldman, Sachs and to me.

Q. Whose handwriting is this?

A. Mine.

Q. Is this a record that you kept on your desk currently?

A. Yes, I did.

Q. To keep track of -- what?

A. Keep track of the sales of commercial paper and which were used by the securities force of my company to pass along this information to Morgan Guaranty, which was the bank that delivered the notes to Goldman against payment.

MR. PIEL: Your Honor, I am going to offer this document in evidence, but with the limitation that we will only rely and only expect the Court to pay attention to or regard to portions which we will now mention in this transcript in getting Mr. Lepley to read them for us where the handwriting is difficult or portions which we refer to in summation briefly.

THE COURT: I don't know what you mean by referred to in summation.

MR. PIEL: I said which we call to the Court's attention in summing up the evidence.

THE COURT: How do I know what you are going to be talking about? You have given me fifty sheets here --

MR. PIEL: Something like that.

THE COURT: Offer the whole thing.

MR. STITT: No objection from the plaintiff, your Honor.

MR. PIEL: Very well, we will offer the whole thing.

THE COURT: All right.

xxx (Defendants' Exhibit BI was received in evidence.)

THE COURT: What do you call this, Mr. Lepley?

THE WITNESS: Actually this is a daily summary of transactions between Penn Central and Goldman, Sachs in commercial paper.

Q To get acquainted with this, now, I ask you, because it seems to have a lot of different things on it and, therefore, we will learn how it works, to look at Tuesday, December 16, 1969. That's the second from the bottom.

Using the second in front of the first because it has more entries on it at different times, will you explain to the Court, please, Mr. Lepley, what you were recording here?

We won't go into a big explanation about all of these, but there are just some that I will want you to read and some that I will want you to explain. Let's have an explanation for this page.

A. All right. The first line there is an example of a commercial paper transaction where Goldman, Sachs bought from us one note of one and a half million dollars par value. It was to mature on January 15, 1970, which was a period of thirty days, at a discount rate of 9-1/8 percent which resulted in an actual discount dollars of $11,406.25, which means that we were paid a net amount of $1,488,593.75.

Q That was paid by Goldman, Sachs picking up the note in question at Morgan Guaranty in New York and authorizing Morgan Guaranty to transfer that 1,488,000 from their account to your account?

A. That's correct.

Q Then there are other transactions.

The next one says you had three $1 million notes for a total of 3 million.

A. That is right.

Q What is the notation in the middle of the page?

A. It says "$50,000 short of the $4,050,000. They will take this 50,000 unless we can handle. Otherwise will handle tomorrow."

Q What does that mean?

A I believe that means -- as a matter of fact I know it means because I look at the top of the page on the right-hand side and see that the amount that was coming due that day was $4,050,000. The first two transactions there which totaled --

Q Maybe the last two transactions.

A Yes, the last two transactions totaled $4 million rather than $4,050,000, which means that they were short of meeting the maturities for the day by $50,000, and they asked that we handle it, that is leave it -- meet the maturity of it, and then they would take care of it the following day by sale.

Q Go on with that notation.

A Then the notation said "This is under $100,000. Okay per Shaffer," that's our treasurer, "Goldman, Sachs to handle on December 17," which was the next day.

Continue on?

Q Yes.

A "Told him week of January 12 is getting too heavy since this brings it to almost $19 million. He will 'keep it in mind.'"

Q Who is "he"?

A He would be at that time probably Lou Drypolcher.

Q Then you have a tabulation in the lower left, represents what, what were you doing there?

A. This is an indication of the desirable maturities that we wanted. I was probably trying to get them at that time to lengthen out their maturities and get the maturities to come more evenly, week by week, rather than having them bunched up in a very short period of time.

Q. Now we come to Wednesday, December 17, 1968, the next sheet.

Please read into the record your handwriting in the middle of the page.

MR. STITT: I believe my adversary meant to say December 17, 1969.

MR. PIEL: I certainly did. Thank you.

A. The notation there is "Lou," who would be Lou Drypolcher, "asked about swing line. Told him still under discussion but will advise when we decide."

Q. Who was doing the discussing? If you know. Where did you learn that fact?

A. This was under discussion between me and Loder and John Shaffer and the financial vice president, Jonathan O'Herron.

Q. Did there come a time in December when you purchased back from Goldman, Sachs notes which they had in their inventory?

A. Yes, there did.

Q. Did you have a discussion about repurchasing inventory on more than one occasion?

A. Yes, several occasions.

Q. When did such discussion start?

A. They started almost as soon as I came with the company in November. I would say probably early December of 1969.

Q. Is it fair to say that they kept after you about that?

A. I think that would be fair.

Q. What were the circumstances of your actually making a repurchase in December? Tell the Court what happened.

A. As I remember it, the inventory in December had gotten up to about fifteen or $16 million which Goldman, Sachs felt was too high for them to be comfortable in carrying out, that it was costing them a considerable amount of money, and that could we buy it back. We indicated that we could when we got some money from another financing.

Q. What was the money that you used to repurchase it?

THE COURT: Wait. We don't know that he did.

MR. PIEL: I think he just said so, your Honor.

THE COURT: But no date was fixed. It could have been May 1970.

MR. PIEL: I thought he said December.

THE COURT: No, he didn't say. He has not put any date in the record yet as to when he repurchased it.

Q When was the repurchase, the first repurchase?

A. In December of 1969.

Q That repurchase, the exact date of which will appear in Exhibit CU, was made with what money or funds?

A. That came from the sale of a Pennsylvania Company debenture.

Q And this was money on the books of Penn Central Transportation Company which had come from that source?

A. That's right.

Q How much did you buy back?

A. As I remember it, the amount was fifteen or $16 million.

THE COURT: I gather that was before maturity, is that what you mean by repurchase?

THE WITNESS: Yes.

Q How much money did Penn Central Transportation Company receive from Pennsylvania Company?

A. I believe it was around $50 million less underwriting expenses. Close to 50 million.

Q What did you do with that money before it got put to work in the operations of Penn Central Transportation Company?

A Well, we used a part of it to premature the inventory from Goldman, Sachs and the remainder was put away in investments, short-term investments.

Q And that meant commercial paper of other issuers?

A That's right.

Q Who made those purchases?

A I did.

Q From whom did you buy that other paper?

A I dealt with Goldman, Sachs.

Q Did any one of your superiors give you any instructions with respect to the commercial paper dealer from whom you were to purchase the paper?

A No, they didn't.

Q Who at Penn Central chose Goldman, Sachs as the dealer from whom to purchase such paper?

A As far as I know, I am the one that chose Goldman, Sachs. I never remember receiving any instructions.

Q On what basis did you make that decision?

A That was simply due to the fact that I dealt with them on the sell side and, therefore, it was convenient to deal with them on the buy side.

Q I want to ask you a question that the Court asked somebody else here last week.

When you had commercial paper outstanding and which was coming due, maturing from day-to-day, why didn't you use that money to retire your own notes instead of buying somebody else's notes?

A. Well, the rate that we were receiving versus the amount that we were paying was essentially the same, so it really didn't cost us any money, and it seemed to us at the time that it might have been dangerous if we brought our commercial paper down by repurchasing it because then it would be more difficult to bring it back up again to the $200 million level.

Q Was that your decision?

A. That was my decision along with the decision of the treasurer, John Shaffer.

Q Now, I would like to go back to Exhibit BI for some more assistance. The next sheet I would like to look at with you is December 23.

Can you read your notes numbered one, two, three, four, please?

MR. STITT: This is for Tuesday, December 23?

MR. PIEL: Yes.

Q I am having trouble with it. Read Note 4. That may be enough for our purposes.

MR. STITT: Why not read the whole note?

MR. PIEL: If he can.

A. I can't read the full Note 1. It starts "The fifty" and then I can't read it. "The fifty into Goldman, Sachs' inventory changed, added to," and then there is something else that I can't read there. The next note --

THE COURT: It looks like "350 line, March 24," whatever that means.

A. (Continuing) The next one, it looks like "Jerry Tripi will call on investing of 10.1 million of excess cash."

Then Note 3, it looks like maybe "3 million," "The 3 million notes" -- can't read that.

THE COURT: "9.3 percent C," and I can't read the rest.

A. (Continuing) I can't read the rest of Note 3.

Note 4, "I made sure Drypolcher knows we want the $16 million commercial paper purchase put out again over period January 2, 1970 to January 9, 1970 and as quickly as possible in that period. He understands."

THE COURT: What does that mean?

THE WITNESS: Note 4, your Honor?

THE COURT: Yes.

THE WITNESS: Note 4 means that although we bought the $16 million of inventory back from them, we prematured it. We wanted them to be sure to bring it back up, to resell it and bring us back up to $200 million in paper outstanding.

THE COURT: All right.

Q Will you please read the entry in your handwriting near the bottom of the sheet for Monday, December 29, 1969?

A. All of those notes, did you want?

Q One, two, three.

A. "Number 1, money very tight. Number 2, the 9-3/8 piece went into Goldman, Sachs' inventory. Number 3, week of 3/16 is a tax date, suggested staying away from this as well as the following week unless, of course, he gets orders for this period and can't avoid it."

Q Would you explain that?

A. Well, money very tight I think is self-evident. The 9-3/8 piece refers to one of the notes above here which went into their inventory which they couldn't find a buyer for, and then the week of 3/16 is a tax date and that's when taxes fall due on corporations apparently and it was a bad time to have a piece of paper mature because it would be difficult for a corporation to come up with money on that tax date.

Q In fact, corporations are liquidating their short-term investments in order to pay their tax bill.

A. That's true.

Q So it is not a good time to try to sell?

A. That's right.

Q January 2, if you please, Friday. At the foot of the page we have your handwriting, "Questions for Shaffer."

Will you read those four numbered questions for Shaffer?

A. "Questions for Shaffer. 1. How want $16 million Goldman, Sachs' inventory repurchased brought back in."

Q Does that mean back into the market?

A. Resold.

"2. Where stand in swing line? 3" --

Q Is that "on swing line"?

A. "On swing line," that's right.

"3. When will earnings statement come out for fourth quarter? 4. Get okay on long private placements from Loder."

Q Are these your thoughts of things you want to ask Mr. Shaffer?

A. Well, some of these were questions which were raised by Goldman, Sachs. Some of these are questions which I raised myself.

Q What about the question, "Where stand on swing line," who raised that?

A That probably would have come from Lou Drypolcher. I can't tell, though, from this note.

Q And the previous one, December 29, the one that started with "Money very tight," does that reflect statements made to you or your own thoughts about the situation?

A That would be a statement made to me from Goldman, Sachs.

Q Going on to Monday, January 5, I would like you to indicate, when you do read these for us, whether you are reading a private notation of your own for something you are going to do or whether you are reflecting something that's been said to you or something you plan to say to Goldman, Sachs so we have a sense of what it was for.

A All right.

Q Monday, January 5, 1970, will you read the three numbered notes?

A All right. "1. Ben Hinkle wants anything over the $8,650,000 invested to January 20."

Q Who was Hinkle?

A He was the assistant treasurer of the Penn Central Transportation Company.

"Settlement at Bankers Trust. Inform him so he can move the funds from Morgan." I don't offhand remember the purport of that notation.

"2. Morgan wants letter confirming purchase of $16 million of our paper," and that probably came to me from one of our backroom people who dealt with Morgan on a daily basis. Then there is an asterisk here which probably refers to a particular purchase, apparently the $2,050,000 purchase. Goldman, Sachs took this into inventory and that refers to the $2,050,000 --

Q That's up above opposite a due date of March 30.

A. Right, due on March 30.

Then Note 3, "Lou asked," and this would be from Lou Drypolcher, "Lou asked about swing line. He will call Shaffer."

Q Now, please turn to January 13, Tuesday. I think we have a calculation, there are two sets of notes, I think we have a calculation near the middle of the page that we haven't seen before. I think it occurs elsewhere, so I will ask you to explain it once. What does that indicate? Again, there is an asterisk relating that note to lines of the record of transaction up above.

A. Yes. I will have to read this.

Q Yes, please do and then explain it to us.

(Pause.)

A. In the middle of the page the notation is there, the first notation is "$5 million out of inventory on sale today."

That means that $5 million of the above sales actually came out of their inventory -- no, $5 million were sold out of their inventory but $3,045,000 was put into inventory today, which means that netwise $1,955,000 came out of inventory. Since there was $14,300,000 in inventory yesterday, $12,345,000 is the net amount which is in inventory as of today, January 13, 1970.

Q. Notes of that kind would indicate the situation at the close of the day?

A. Yes.

Q. Based on advices from Goldman, Sachs in the afternoon about what had happened during the trading day?

A. Yes, and sometimes after that notation there might be a change, later on in the afternoon when a late sale was made, and instead of 12-3, it looks like, in this particular case, it was brought down to 10 million 7.

Q. Would you read us the next set of notes numbered one, two, three?

A. Note 1, "This brings us back up to $200 million outstanding but leaves $12.3 million in inventory." I think that is self-evident.

"2. Later in the day Van Cleave says inventory dropped to $10.7 million." That means they sold an additional almost $2 million from inventory.

"3. Van Cleave says can eliminate inventory in a couple of days."

THE COURT: Mr. Piel, I think we will have to suspend for the day. It is a quarter after four. You can't finish with this witness.

MR. PIEL: I am sorry.

THE COURT: That is all right with me.

MR. PIEL: Sorry I can't release the witness.

THE COURT: See you tomorrow morning at 10:00 o'clock.

(At 4:15 p.m., an adjournment was taken to Tuesday, June 10, 1975 at 10:00 a.m.)

LHd

FRANKLIN SAVINGS BANK OF NEW YORK

v. 71 Civ. 882

GUSTAVE L. LEVY, et al.

June 10, 1975
10:00 a.m.

(Trial resumed.)

RAYMOND LEPLEY, resumed.

MR. PIEL: If your Honor please, last week I offered in evidence Exhibit FA for identification, memorandum from Hy Weinberg to George Doty with reference to the aging of commercial paper in inventory. Your Honor delayed receiving the document to give Mr. Stitt an opportunity to study it. He has had that opportunity, and I reoffer it.

MR. STITT: Your Honor, it was not produced in pretrial discovery, not listed in the pretrial order, but we have no objection.

(Defendants' Exhibit FA was received in evidence.)

MR. PIEL: If your Honor please, I offer in evidence Defendants' Exhibit B-19 for identification, which is the revolving credit agreement between Penn Central Company and First National City Bank as agent for a number of banks, dated April 1, 1969.

THE COURT: Is that the $300,000,000 one?

MR. PIEL: Yes, your Honor.

THE COURT: What do you need it for?

MR. PIEL: There have been various references here and interrogation of Mr. Sullivan, who didn't have precise knowledge of it, regarding the fact that the revolving credit agreement involved the imposition of certain so-called negative pledge conditions. The result of all of that is summarized on -- I believe it is Page 7 of the December offering circular, but in order to put in the primary evidence of what in fact the revolver did in the way of encumbrance, so that there is no misconstruction from Mr. Sullivan's generalized statements, I thought it would be useful to have this in.

THE COURT: Any objection?

MR. STITT: No objection, your Honor.

THE COURT: All right.

(Defendants' Exhibit B-19 was received in evidence.)

MR. PIEL: As part of that, the first amendment to the credit agreement dated September 24, 1969, which contains some of the covenants. That is Exhibit for identification B-24.

MR. STITT: I take it it is represented that these all come from the files of Goldman, Sachs?

MR. PIEL: Yes, indeed.

MR. STITT: No objection.

(Defendants' Exhibit B-24 was received in evidence.)

THE COURT: What is the date of the amendment?

MR. PIEL: The date of the amendment is September 24, 1969.

DIRECT EXAMINATION CONTINUED

BY MR. PIEL:

Q I think yesterday, Mr. Lepley, we got as far in reviewing your daily commercial paper summaries -- we got up to January 13th. In fact we got through it. This is Exhibit BI, your Honor.

We will go to the sheet, if your Honor please, for Wednesday, January 14th.

Mr. Lepley, do you have that sheet?

A Yes, I do.

Q Can you read your handwriting for us at the bottom of the page that begins, "Van Cleave"?

A Yes. "Van Cleave note: Although the $100,000 went into inventory, they have sold about two plus million out of inventory, so net inventory now is about $8,000,000, plus or minus. A lot of inventory is tied up in repos, so can't get rid of this until things shake loose. Have already done $2,000,000 for tomorrow," and then I can't read the last line.

Q "Van Cleave says can't eliminate"?

A That's right, "Van Cleave says can't eliminate."

THE COURT: Isn't that crossed out?

THE WITNESS: Yes, it is.

Q That is crossed out.

Repos is the repurchase agreement arrangement that you mentioned before?

A Yes, sir.

Q Does this reflect statements made to you by Mr. Van Cleave over the phone?

A Yes, it does.

Q Go to January 15th, the asterisk --

THE COURT: Pardon me. I noticed in the other documents when they speak of millions they have an MM. You only use a single M. Do you mean three or six zeros?

THE WITNESS: I use a single M with a bar over it for a million, your Honor, and a single M without a bar for thousands.

Q Let me go back to the 14th. What was the meaning to you of the "can't get rid of this until things 'shake loose'"?

What does shake loose refer to?

A It refers to the repos that they had executed when they sold some of this commercial paper from inventory.

Q Do you mean by that procedures they have to go through to get the papers out of the repo agreement?

A Yes.

When they sell a commercial paper note under repo, that means that on a certain date in the future, the repo date, they will have to buy it back, and at that point the paper would shake loose.

Q On Thursday, January 15, 1970, asterisks indicate two notes, asterisk and the footnote to it indicate two notes purchased by Goldman, Sachs from you and put into their inventory?

A That is correct.

Q What is your handwriting below that at the foot of the page? What does it say?

A "Inventory, down to $6,000,000,000 as of 4:30 p.m., January 14th. Of the 6,000,000, about 3,000,000 are on repo."

Q Now let's move ahead to January 23, 1970.

Incidentally, on many of these sheets, including this one, there is a figure in the upper left-hand corner. If you will look at the previous day, January 22nd, it says $7,500,000 roll-over and on this sheet for January 23rd it says 2400. Would you interpret those for us?

THE COURT: Wait a second. Thursday, January 2nd says what?

MR. PIEL: I beg your pardon. I am on January 23rd and I was looking at another sheet.

THE COURT: Which you identify for the record as January 22nd.

MR. PIEL: I said 22nd, your Honor, but it is January 26th. I misread the writing.

THE COURT: Do you want to wait until you get to January 27th in chronological order?

MR. PIEL: All right, your Honor.

Q Let me ask you, then, on January 23, 1970, which was a Friday, according to the dating of the 1926 sheet, what does 2400 mean in the upper left?

A That's where I put the amount that was coming due that day.

Q Is that true on all the other sheets where the figure appears in that position?

A That's normally where I wrote the amount that was coming due.

Q That was the maturities of that date?

A That's right.

Q Which would either have to be paid off or else rolled over by the sale of a note for the same amount?

A That's correct.

Q Do you know from having worked with Goldman, Sachs on this matter whether the same investor would frequently roll the note with you?

A I really wouldn't have knowledge of that.

Q On January 23, 1970, what is your handwriting at the foot of the page?

A "Note: Van Cleave was trying to get hold of O'Herron on size of the inventory."

Q How did you know that?

A That was told to me either by Van Cleave or by Lou Drypolcher, who I informally talked to.

Q Now we come to January 26, 1970, which I previously read, the date, and here in the upper left-hand corner your symbols indicate that seven and a half million dollars are coming due and that you want it rolled over.

A That's correct.

Q Now let's go to January 20th. Will you read the notation in the middle of the page?

A The notation says, "Want to swap 3 to $4,000,000 this afternoon for Monday business."

Q What does that mean?

A That would probably mean that they wanted us to repurchase -- to premature 3 to $4,000,000 from their inventory and give them a different set of maturities. That would be my guess.

Q More saleable maturity?

A That's right.

Q That was on a Friday, January 30, 1970?

A That's right.

Q Now we go to February 6th. What is your note at the foot of the page?

Excuse me. This again is a Friday.

A The note says, "On Monday Penn Central will buy $10,000,000 back from Goldman, Sachs, including the swing line."

Q Was this the first time that you used the swing line?

A To my recollection, that was the date that we negotiated the swing line with two of the banks.

Q How was that done? Can you explain that? Was that taken from the so-called standby line?

A Yes.

Q The standby line, which you explained, would take a few days to draw on, so it was arranged for it to be made available for immediate drawing so you could use it to swing inventory, is that right?

A That's correct.

Q How much was converted to swing line, if you remember?

A I believe that on February 6th it was about $10,000,000.

Q Was it later increased?

A It was later increased to $17,000,000.

Q Out of the total $50,000,000 standby lines?

A Out of the total $50,000,000 standby lines.

Q Is that right?

A That's correct.

Q Now I'd like to show you Exhibit BY in evidence. This is a tabulation not from your files, sir, but just to assist us. This is a tabulation of various credits outstanding or loans outstanding to Penn Central, which is on the left-hand column, Penn Central Transportation Company and Pennsylvania column which is the four right-hand columns as explained to us by Mr. Sullivan yesterday. Do you see the line called "unsecured bank lines"?

You follow that down noting the banks that are involved, and on the third page is the total of $46,500,000. Do you know what that represents?

A I know that we took down 46 and a half million from the standby lines.

Q So that that column represents the participations in the standby line?

A It would appear to be that, yes.

Q When you say you took down, you mean in addition to converting $17,000,000 to swing lines, at some later date you also drew on the standby line?

A Right, so that the total of the swing line plus the draws equalled 46 and a half.

Q You noticed that --

THE COURT: Wait a second, I am getting lost. You say the unsecured bank lines of 46 and a half million dollars is a combination of what you took down on the back-up line as well as the swing line?

THE WITNESS: That's right. Part of the back-up line was converted to a swing line, your Honor.

THE COURT: But this is a June document.

MR. PIEL: That's right. I am just focusing on these figures, using the document to assist us in getting this testimony.

Q You see the name of Brown Brothers Harriman among those in the standby line column? It is on the second page, the fourth name from the bottom.

A Yes, I found that.

Q When did Brown Brothers Harriman lend the $2,000,000? In other words, when did you take down from

Brown Brothers Harriman under their standby line participation?

A They were part of the first batch that was taken down under the standby line on about April 30th of 1970.

Q Then there was another batch taken down at a later date?

A Yes, there were two more batches. I believe May 5th and May 11th.

THE COURT: Wait a second. Brown Brothers' 2,000,000 was taken down in April?

THE WITNESS: That's right.

MR. PIEL: April 30th.

THE COURT: From the standby line?

THE WITNESS: That's correct.

THE COURT: You said there were two more taken?

THE WITNESS: There were two more taken down under that. One took place on May 5th and one on May 11th.

Q Mr. Lepley, the total shown on this chart is $46,500,000, not $50,000.

A Million.

Q I am sorry, I am having zero troubles all the time. I beg your pardon. 46 and a half million dollars. So that is a short fall from the $50,000,000 of 3 and a half million dollars?

A That's right.

Q How do you account for that?

A Well, there were two banks that did not honor their commitment to provide funds under this standby line.

Q They declined to put the money up?

A That's correct.

Q What were those two banks?

A One of the banks was, I believe, a Florida bank and another one was in White Plains, New York.

Q I show you Exhibit BZ in evidence and ask you if that is one of the documents by which a part of the standby line was converted to swing line?

A Yes, this is one of those documents.

Q That was dated February 5, 1970, is that right?

A Yes, sir.

Q Whereas your first use of the swing line then, as we saw in Exhibit BI, was on February 6, 1970?

A About February 6th, according to my memory, yes.

Q I beg your pardon. Your memorandum of February 6th says, "On Monday will buy," so it was February 9th that it was first used?

A Right.

THE COURT: I see this document says that you paid upon demand. Is that the same as the standby or back-up line had to be paid on demand?

THE WITNESS: Yes, these are all supposed to be demand notes, your Honor.

THE COURT: So all you have done here is merely made the credit line available to you two or three or four days sooner than it would have been?

THE WITNESS: I made it available to us instantaneously upon telephone call.

Q Now I'd like to go to February 16, 1970. There is an asterisk --

A Is this on BI?

Q Yes, sir. Will you read the legend into the record that's in the middle of the page or the notation?

A The notation alongside of an asterisk is, $3,700,000 new paper to pay back swing line."

Q That is connected by an asterisk to a total of $6,800,000 in the tablulation above?

A That's right.

Q According to what you told us before, the $1,800,000 and the $5,000,000 would have been notes sold that day by you to Goldman, Sachs?

A That's correct.

Q Either for their inventory or for a resale by them to investors in the short-term money market?

A That's right.

Q Now will you explain what the footnote means?

A Well, on this particular sheet it looks like I wrote 3,100,000 roll-over in the upper right rather than the upper left, and since we sold a total of six million eight to Goldman, Sachs that day, that would indicate to me as I noted in the footnote that $3,700,000 was new paper which could be ysed then to pay back the swing line.

Q And the other 3,100,000 was used to meet the maturities on that day?

A That's right.

Q Goldman, Sachs in acquiring these notes for you, as you told us before, that would result in a transfer of federal funds from their account to your account at Morgan Guaranty, and would Morgan Guaranty then repay the lending bank on the swing line?

A We would instruct Morgan Guaranty to wire the funds to the swing line banks.

Q Whatever they were at that time?

A Right.

Q March 4th, and this is I think a sample to help us read some of these others on other occasions. Will you start with "borrow from swing line," read that to us, and then explain what the notations and calculations mean?

A It reads, "borrow from swing line $1,000,000. Will get the $1,000,000 sale which was cancelled on Friday when it will be a 270 day note."

Then my notation is, "Previous inventory zero, new inventory 3 million fifty. Current inventory 3 million 50."

Q Does that mean Goldman, Sachs inventory?

A That is right.

Q. Then on the right?

A Then on the right my notation reads, "Previous swing line avails 2,075,000, borrow 1,000,000, current swing line avails $1,075,000."

THE COURT: What does that mean?

THE WITNESS: That notation on the right means on that day we started out the day with $2,075,000 available from the then existing swing line credit. We had to borrow 1,000,000 which left then only $1,075,000 available under the swing line credit.

Q So the word avails really means available?

A That's right.

Q Now if you will turn please, to Thursday, March 12th, and will you again read what is in the middle of the page and then explain it to us, and I think that's the last time I will ask you to do calculations for us?

A   My notations here read, "Sales 5,500,000, roll," which meant roll over --

Q   Meaning maturities?

A   Maturities on that day, "$4,000,000. Swing line" -- SL means swing line -- $$1,500,000 reduction. previous swing line avails 5,225,000. Current avails $6,725,000."

Then it says, "available for sale by Goldman, Sachs $3,275,000."

Q   What does that mean, that particular entry?

A   That last entry means that the swing line on that date was a total of 10,000,000, 6,725,000 of it had not been touched on that day and that means that we had actually borrowed from the swing line $3,275,000 and that means then that Goldman, Sachs could sell that much, we could use that to pay back the swing line, and I believe that that would have brought us back up to $200,000,000 in commercial paper.

Q   Outstanding?

A   Outstanding.

Q   Again, I will mention that CU can be tied into that to show -- to check Mr. Lepley's statement.

Then it goes on to say, Mr. Lepley --

A   8-5/8." That means percent discount rate, "8-5/8 across the board today but had a large block order at 8-3/4. I took it."

Q That's more expensive for you?

A That's right.

Q It is a bigger discount?

A That's correct.

Q Across the board means on notes that you sold to Goldman, Sachs other than the large block order?

A Well, across the board would mean that the rate was the same from one day out to 270.

Q That would be the prevailing rate?

A That would either be the prevailing rate or the rate that was established for our particular paper, which in my case was the same as the prevailing rate.

Q Moving into April, let's look at the summary sheet of April 8, 1970. I think from what you have told us we can interpret the table in the middle of the page, a tabulation of avails, meaning available to borrow and available to sell, which would make a total of 17,000,000 swing line.

A That's correct.

Q Those two figures. The notation under that says what?

A "George Van Cleave agreed that they will take $5,000,000 into inventory tomorrow, if necessary."

Q Why would it be necessary?

A If they couldn't meet the roll-over.

Q "Tomorrow" referred to --

A April 9th.

Q -- April 9th, and if you look at that date, will you review for us the swing line use on that date? First, in the upper left-hand corner there are the days' maturities divided into a note coming due that day, and then it says, "1250 prepay."

A That's correct.

Q Will you explain that?

A There was 1,675 coming due, which is the amount of roll-over sales that they would have to do for us. Then there was 1 million 250 of prepayment, so that really in order to keep us whole cash-wise, they would have to have sold 2 million 925. That's the significance of that notation.

Q In fact, however, they sold more than that, is that correct?

A It appears from this that a total of 6 million 5 was sold that day.

Q If you compare the swing line availability columns with the previous day, you see that on April 9th the availability was greater than on the day before?

A That's correct.

Q Because they had sold more notes than necessary to meet the roll-over and the prepayment?

A That's correct.

Q What were the circumstances under which you made prepayments from time to time?

A Well, if Goldman, Sachs asked us to make a prepayment which was in our opinion reasonable, for example, if they wanted to change maturities, we would prepay it for them.

Q Did you sometimes prepay it at the original or initial request of an investor?

A Of an investor?

Q Yes.

A Not that I can ever remember.

Q Not directly with you?

A No. I never dealt with their investors.

Q Will you look at Friday, April 10th? On Friday, April 10th, we see that sales are up and the swing line is now available to you as $15,675,000, is that right?

A That's correct.

Q You are putting money back in the bank out of commercial paper sales?

A Yes.

Q On the next day, April 13th, you have put back all but $325,000 of the $17,000,000?

A That's correct.

Q So that sales were going well in this period?

A That's correct.

Q Now, let's turn to Wednesday, April -- first we better look at Tuesday, April 28, 1970. This indicates that at the end of April swing line status available to borrow, zero. You had used your entire swing line at that point?

A That's correct.

Q And additional cash required not available in swing line, $3,000,000?

A $3,010,000.

Q Is this the point at which you began to take down from the standby line?

A Well, it was somewhere around this period. I had thought --

Q Look at Thursday, April 29th.

MR. STITT: I have Wednesday --

Q I beg your pardon, Wednesday, April 29, 1970.

A Yes, this indicated that on -- this indicated by the notation on April 29th, I mentioned that we borrowed yesterday, which would have been the 28th, $3,010,000 and we borrowed today, which was the 29th, $3,800,000, for a total of $6,810,000. But then my notation on that is, "actually from cash balances."

Q In other words, you took it out of government account rather than out of the standby line at that point?

A It came out of demand accounts on that particular day.

THE COURT: Let me understand this. You say that on April 13th you had replenished the swing line so that the whole $171000,000 was available to you?

THE WITNESS: On the 13th I indicate almost all of it was available. 16 million 675.

THE COURT: And between April 13th and April 28th you are down to zero?

THE WITNESS: That's correct.

THE COURT: You used it all up?

THE WITNESS: That's correct.

Q And thereafter began to ask the banks to honor the standby line?

A That's correct.

Q The ones who were willing to do so?

A That's right.

Q On April 30th, Thursday, 1970, I am going to ask you to read us what you have written below the usual tabulation at the top?

MR. STITT: Referring to the roll-over?

MR. PIEL: No.

Q Below the notation of the sales that day, there were two sales that day, is that co-rect?

A That's correct.

Q For short maturities?

A Each for $1,000,000, one for four days and one for six days. The notation underneath that is, "Bob Wilson: A out of the 12" --

Q Excuse me. It says A because there are two parts to it, A and B?

A That's right.

Q The A part says what?

A "Out of the $12.6 million due today" --

Q Then there is a little "a" in parentheses.

A Yes. "One big state retirement fund moved $5,000,000 to a sub of AT & T."

Q Meaning instead of reinvesting in Penn Central?

A That's correct. Then little "b", "One big New York bank says its customers needed the cash, $5,000,000."

Q Now part B?

A "Mobil Oil has 3 and a half million to June 10th and 5,000,000 to November 16th. They want to be prepaid on Friday, May 1, 1970."

Do you want me to go further down?

Q Yes, please.

A "Mobil" -- it looks like "Mobil 8-1/2 on Tuweday" --

Q Doesn't it say, "to," to you, or does it say "on"?

A By Tuesday by Goldman, Sachs in inventory or talk Mobil into waiting until then."

Q Then it goes on on the lower left, "alternates."

A "Alternates," small a, "Goldman, Sachs sells notes as is to someone else. Alternate b: Penn Central Transportation prepay and Goldman, Sachs sells to different maturity. Alternate c: Prepay from our cash. Alternate d: Refuse to prepay (not recommended by Goldman, Sachs.)"

Q The next paragraph notation?

A "JOH," that is Jonathan O'Herron, "agreed with Wilson."

Q That is "agreed," with a "d"?

A Apparently, yes. "Goldman, Sachs will buy" --

THE COURT: Will try?

THE WITNESS: "Will try to talk Mobil" --

THE COURT: "To extend to Tuesday."

THE WITNESS: "To extend to next Tuesday." If unsuccessful, Goldman, Sachs will" --

Q "Take into"?

A "Take into inventory to next Tuesday."

Q Next to that or behind that is a sheet, not one of your summary seets, but a blank sheet, that is headed, "Mobil Oil." It appears to compare cash and marketable securities, current assets and current liabilities and the net working capital for two periods, one ending December 21, '68, and the other December 31, 1969.

Can you explain what that is?

A As I remember this, Jonathan O'Herron asked me whether it was reasonable that Mobil Oil needed cash, and he asked me to take a quick look at their balance sheet, which I did, and I came up with these figures.

Q They did not have as much working capital at '69 year end as it had had at the previous one?

A That's correct, but it was not significance, in my opinion.

THE COURT: I gather, what is that working capital, a billion?

THE WITNESS: That is right.

THE COURT: That's only $80,000,000 out of 1,000,000,000. That's not much.

MR. PIEL: That appears to be all that I have. Thank you, Mr. Lepley.

CROSS-EXAMINATION

BY MR. STITT:

Q Mr. Lepley, I am going to ask you to tie together for us, if you may, what may be some loose ends concerning the matter of jurisdiction. I take it you handled the day-to-day duties in connection with Penn Central's commercial paper sales from November '69 through June of 1970, did you not?

A That's correct.

Q And you did this from your office in Philadelphia?

A That's correct.

Q Is it true that you were in daily business day contact with Goldman, Sachs during the period, say, November, 1969, through, oh, April 1, 1970?

A That's correct. When I wasn't elsewhere.

Q That would be with either Drypolcher, Mr. Lynch, or Mr. Van Cleave?

A That's correct.

Q I am going to place before you the following documents, F-89, which is the commercial paper note issued to the Franklin Savings Bank, or a xerox thereof; F-89A, which is the original of F-89, and also these documents clipped together, Exhibit F-88. These are documents from Franklin's files with respect to its purchase of $500,000 note on Monday, March 16, 1970.

Do you have those documents before you?

A Yes, I do.

Q Would you consult your log, Exhibit BI, for the page March 16, 1970?

A The page that I have has the date -- it is outside of the range of the zerox copy, but I think I have the 16th.

THE COURT: It says, "roll-over 9 and a half million."

THE WITNESS: 9500?

THE COURT: Yes.

THE WITNESS: Okay, I have it.

Q Do you find a reference on that page for March 16th concerning Franklin's note, Exhibits F-89 and F-89A in evidence?

A I see a note which is due on June 26th in the amount of $500,000. That's the closest I can come to identifying this as being the Franklin note.

THE COURT: What is the discount on that note, Mr. Lepley?

THE WITNESS: The discount according to my records is 8-5/8.

THE COURT: I see, there is a different discount they sell it to their customer.

THE WITNESS: And I don't know what they would have sold it to Franklin for.

THE COURT: Is it a 102 day note?

THE WITNESS: Well, it is due June 26th, and that's the same as the note Number 789.

Q So would it be your testimony that this is a reference to Exhibit F-89 and F-39A?

THE COURT: It might be. It is not his testimony that it is, Mr. Stitt.

MR. STITT: I am sorry, your Honor.

Q Do you find any other notes on that log of yours from March 16th having a face amount of $500,000?

A No.

Q And is that the face amount of the Franklin note, Exhibit F-89?

A 500,000 is the face amount of the Franklin note.

THE COURT: Pardon me. Doesn't this all show up on the Exhibit CU?

MR. PIEL: Yes, your Honor.

THE COURT: Are you denying that this is the note, Mr. Piel?

MR. PIEL: No, your Honor. I think an examination of Exhibit CU would show that it was a special order note, not a sale from inventory, so this would have to be it. I didn't know what Mr. Stitt was driving at.

THE COURT: He is trying to say that on this Monday, March 16th summary -- included in your Exhibit BI, it shows only one $500,000 note, and would that be the note in issue? I gather it is the note in issue.

MR. PIEL: Your Honor, I think we have to conclude that that is the note.

THE COURT: Go ahead, Mr. Stitt.

Q I would call your attention, Mr. Lepley, to the fact that there has been testimony by Mr. Van Cleave that Franklin's $500,000 note was handled on March 16th by Goldman, Sachs on a special order basis. First of all, can you tell us how you became aware of this transaction on March 16th?

A I became aware of it probably by telephone call that day. I normally received a telephone call from a Goldman, Sachs representative approximately 10:00 to 11:00 o'clock in the morning.

Q That was the standard operating procedure?

A That's correct.

Q And during that telephone conversation you would discuss sales that had been negotiated on that day on a special order basis?

A We would discuss all sales made that day.

Q And this would be a telephone call from Goldman, Sachs in New York to you, in Philadelphia?

A That's correct.

Q I call your attention to the promissory note itself, the original. I see Mr. Shaffer's signature is a facimile?

A That's correct.

Q And I see that Morgan's signature is in ink?

A That looks like a veritable signature, yes.

Q How are these notes printed up and made available to Morgan for countersignature?

A We had them printed up by a printing company with Mr. Shaffer's facsimile signature on it and turned them over to Morgan, who would hold them in safekeeping.

Q You would have them printed down in Philadelphia?

A I don't remember where.

Q Somewhere in that general area?

A I really don't know.

Q After they were printed, how did they get to Morgan?

A We probably had the printing company deliver them direct.

Q By mail or by hand?

A That I don't know.

Q Do you know the name of this printing company?

A No, I don't.

Q Would you tell us how Morgan got the word to countersign the note, Exhibit 89?

A After I received the information by telephone and marked it down on this daily sheet in Exhibit BI, I would turn them over to the securities people in my office, who in turn then would contact Morgan and tell them the amount and number of notes and maturity date.

Q And this would be a telephone call from your securities division or office in Philadelphia, to Morgan in New York?

A That's correct.

Q And Morgan would then issue the note?

A That's correct. Against payment.

Q Against payment. Would Morgan be sent any document confirming the instructions that had been given to them by telephone?

A I believe that we did send confirmation of our instructions to them.

Q Is that your best recollection?

A That's my best recollection.

Q And these would be sent by mail?

A Yes.

Q I draw your attention to the notation, "Federal funds," which appears on, among other places, the first document of the group which makes up Exhibit F-88 in evidence. Would you tell us what would happen to those funds? Federal funds paid on behalf of the Franklin Savings Bank in New York on Monday, March 16th?

A Well, Franklin would have transferred federal funds from Franklin to Morgan in payment for the note in the amount of 487 some-odd thousand dollars. I don't know whether I can follow your question any closer than that.

THE COURT: We have been told that Franklin paid Goldman, Sachs and Goldman, Sachs paid Morgan. In other words, Morgan delivered the note to Goldman, Sachs against payment and then Goldman, Sachs delivered the note to its customers against payment.

THE WITNESS: You are right, your Honor. I am sorry, I was a little confused there.

MR. STITT: I thank the Court.

Q I would ask you, Mr. Lepley, to pick up what happened to those federal funds now that we have got them in the hands of Morgan in New York?

A They are now in our account in Morgan?

Q That would be my question. Would they be placed in your account?

A I was confused on the last question. In restating it, if Morgan issued the note to Goldman, Sachs, which was their normal practice, Goldman, Sachs would make payment, and it was my understanding that Goldman had an account at Morgan so that they would simply transfer the funds from one account to the other.

THE COURT: You are not trying to trace the actual funds, are you?

MR. STITT: No, just generally, your Honor. I want to find out what the practice was.

THE COURT: I gather that Goldman, Sachs directed payment to Morgan out of whtever balance it may have had. It may not have included this $500,000, which could have been put someplace else.

MR. PIEL: Your Honor, I think the evidence is clear that Goldman, Sachs acquires the note from Morgan against payment in federal funds of Goldman, Sachs to the account of Penn Central at Morgan's. In other words, both of them have an account there. They debit the federal funds account of Goldman, Sachs and credit the federal funds account of Penn Central.

Now that Goldman, Sachs has the note, later in the day they go to the Chemical Bank which acts as the physical receiving agent for Savings Bank Trust Company, which is acting as a custodial agent for Franklin. They are all in New York.

Goldman, Sachs delivers the note to Chemical Bank, where Goldman, Sachs has a federal founds account, too. Chemical Bank debits Franklin Savings Bank or the Savings Bank Trust Company's federal funds account and credits Goldman, Sachs.

So there are two entirely separate federal funds transactions, one by which earlier in the day Goldman, Sachs buys the note and the other later in the day by which Goldman, Sachs sells the note, and I think the evidence is clear to that effect.

THE COURT: That is my understanding.

MR. PIEL: From Mr. Bock and others.

MR. STITT: I thank my adversary for that explanation, your Honor.

Q Did you have any further communications with either Goldman, Sachs or Morgan by telephone on March 16th concerning the actual receipt of the funds?

A We probably would have moved the funds from Morgan somewhere to whatever one of our banks needed the funds taht day.

Q Where would they have been moved in normal course?

A If we had a swing line in operation on that day, which I assume we did, since it was March 16th, we probably would have moved them to pay off the swing line, or if the amount of the sale that day by Goldman, Sachs was exactly equal to the maturity, the funds would be used to pay off the investors who were presenting their notes for payment.

Q Would this involve movement of those funds or credit outside the State of New York?

A Any of those transactions?

Q Yes.

A If we moved the funds to our swing line in Chicago or Cleveland, it would have moved funds from New York to outside of New York.

Q Is that where you had them at that time, the swing lines?

A The swing lines were with banks in New York and Cleveland.

Q Is there also a cash reporting system that comes into play in this transaction, referring to a cash reporting system of Penn Central Transportation Company?

A This particular transaction? Are you referring to the cash reporting system in general?

Q Yes. Once you got the information from Goldman, Sachs as to the sale and the rate and the discount, was there a procedure whereby you would put this information into a cash reporting system of Penn Central Transportation?

A Yes.

Q Tell us what that system is, Mr. Lepley.

A Well, the system in essence is that every cash transaction has to be reported in the books of the company, and for every commercial paper transaction, I am not sure on an individual transaction, but at least on a total for the day basis, the transactions would be reported into the cash system by making up the cash ticket, which in turn then is sent to the accounting department and enters the general ledger of the company.

Q Where was the accounting department at this time?

A The accounting department was located in 32nd and Market Streets in Philadelphia and also at 6 Penn Center, Philadelphia.

Q Did that involve any use of the mails either on the initial notification or a memorandum or letter confirming the transaction?

A To our accounting department?

Q Yes.

[illegible] Not that I am aware of. Not the U. S. Mail.

Q You testified about the subject of bank lines, Mr. Lepley, on direct examination, and I believe you mentioned that you attended a meeting at Goldman, Sachs in New York on December 9, 1969?

A I attended a meeting in December of 1969. I don't remember the exact date.

Q I show you Exhibit F-63 in evidence, I believe you have identified this as a traced copy of your handwritten memorandum of December 9, 1969. I ask you if this document refreshes your recollection as to the date of this meeting?

A Yes, it does.

Q This was held in New York at the office of Goldman, Sachs?

A That's correct.

Q Is it true that at this meeting Goldman, Sachs brought up the subject of bank lines?

A They brought up the subject of swing lines and back-up lines.

Q At this time Penn Central had bank line coverage in total of $100,000,000?

A That's correct.

Q This represented 50 percent of its then outstandings of $200,000,000 in commercial paper?

A That's correct.

Q The $100,000,000 of bank line coverage was made up of two groups of $50,000,000 each?

A That's correct.

Q One $50,000,000 group was part of the $300,000,000 revolving credit agreement of April 1, 1969?

A That's correct.

Q This was $50,000,000 out of $300,000,000 that was specifically reserved to cover commercial paper?

A That's correct.

Q And the other $50,000,000 was made up of standby or back-up lines?

A That's correct.

Q And I believe you mentioned Brown Brothers Harriman and First National of Chicago, among others, as being in that group?

A I believe I mentioned Brown Brothers, any way.

Q Is it true at this meeting you were told by Goldman, Sachs that a level of 80 percent was customary for its issuers, or at least 80 percent?

MR. PIEL: May I point out that the document is being misread --

THE COURT: He asked him a question if that happened. The witness can say no.

A Would you repeat that question, please?

Q. Yes. What were you told by Goldman, Sachs concerning the level of bank line coverage maintained by its other issuing companies?

A If my memory is correct, they told us that 80 percent to 100 percent coverage was typical of their companies.

Q And you were told that a majority of their issuing companies had 100 percent coverage, were you not?

A Well, I don't remember that they told me a majority. I have written down here in my notes of the meeting, "Many have 100 percent."

Q I just show you Page 46 of your examination before trial, and I direct your attention to that page and ask you if that refreshes your recollection as to whether or not you were told that a majority of their customers had 100 percent coverage?

A I think that's correct.

Q That's your best recollection?

A That's right.

Q I believe you testified that you made a number of inquiries at that meeting of Goldman, Sachs as to the number of issuers that they had which had 100 percent coverage for their paper?

A That's true. I did make those inquiries.

Q As a result of those inquiries and the response that you got from Goldman, Sachs, you were pretty well [illegible]

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vinced, to use your words, that Penn Central with 50 percent coverage was, and using your words, "sticking out like a sore thumb" at Goldman, Sachs?

A That's true.

MR. PIEL: Mr. Stitt, are you reading from the Welch trial transript in quoting him about his words? I think we should have his testimony here, not import the transcript of another trial, if your Honor please. It isn't even his deposition in this case.

THE COURT: He merely asked the witness did he use in his words, "sticking out like a sore thumb" and the witness said yes.

MR. STITT: I am referring, your Honor, to Page 49, for example, of the witness' examination before trial conducted in the consolidated discovery proceedings under date of May 22, 1973.

MR. PIEL: Thank you.

The language, your Honor, is, "We could report that we were more or less sticking out like a sore thumb."

THE COURT: The witness did not deny he made the statement, Mr. Piel. He was asked is that the way he characterized it. The witness said yes. I am not bound by what appears in some other deposition or trial. He said yes on this trial.

Q You then went back to Philadelphia and you had a discussion concerning this subject of bank line coverage with other representatives, did you not?

A That's correct.

Q Mr. Shaffer, was he one of them?

A I discussed it with Mr. Shaffer and as I remember Jonothan O'Herron.

Q And also Mr. Loder?

A I believe I also talked with Mr. Loder about that.

Q O'Herron has been identified. Would you give us the positions of Loder and Shaffer?

A Mr. Shaffer was the treasurer of the company and Mr. Loder was the assistant vice-president in charge of corporate finance.

Q Did you report to those gentlemen that, to use your words, Penn Central was sticking out like a sore thumb at Goldman, Sachs?

A I don't remember if I used those words, but I certainly transmitted to them the information that Goldman, Sachs had told us, that we should have a higher back-up percentage.

Q Higher than 50 percent total coverage?

A Yes.

Q In meetings or a meeting or meetings with

Mr. Loder, Mr. O'Herron and Mr. Shaffer after this December 9th meeting in New York, did you consider whether Penn Central Transportation could get additional bank lines?

MR. PIEL: I object to this, your Honor.

THE COURT: Overruled.

MR. PIEL: What he considered is irrelevant.

THE COURT: You may answer the question.

A Yes, we did consider whether we could get additional bank lines.

Q Tell us about those discussions, Mr. Lepley.

A Well, as I remember it, the general trend of the discussion was that additional bank lines would be difficult to get, they would be costly, even if we didn't take them down they would probably require balances, that there was the possibility of getting maybe Euro-dollar back-up lines.

Q Before we get into Euro-dollar back-up lines, was consideration given as to whether such increased coverage could be obtained from domestic American banks by Penn Central Transportation?

A I remember the discussions to the effect that it would be difficult to get domestic -- additional domestic credit for back-up lines.

Q Why was that, Mr. Lepley?

A Because of the state of the market at the time, there was a shortage of money, as evidenced by an extremely rapid rise in interest rates, and also by virtue of the fact that our company was very heavily borrowed from a significant number of banks.

Q Did you finally come to a conclusion, if not in December, at some later time, that Penn Central was borrowed up to its limit with the domestic banks of this country?

A I came to that conclusion. I don't really know whether my management agreed or not.

Q When did you come to that conclusion?

A In the spring of 1970.

Q The general thought was expressed at your meetings, that general thought was expressed at your meeting or meetings with O'Herron, Shaffer and Loder in December 1969?

A I really don't remember whether I expressed that thought to them or not. I remember I certainly had that thought.

THE COURT: Wait a second. You say you came to that conclusion in the spring. Mr. Stitt is trying to put you back in December. Was it in December or was it in the spring?

THE WITNESS: I think I also had that impression not too long after I came with the company, your Honor, which was in November of '69.

Q When you say "not too long after you came with the company," would you give us the time estimate?

A I can't be more specific.

Q A month?

A I really can't say.

Q Six weeks?

A I can't say.

Q By the end of December?

A I would say probably in that neighborhood.

Q That's your best recollection?

A That's right.

Q Did Penn Central in fact increase its bank line coverage at any time after December 9, 1969, continuing right through until the date of the reorganization petition of June 21, 1970?

A No. I don't believe there was any increase in bank lines specifically associated with commercial paper.

Q That's your best recollection?

A That's correct.

Q You mentioned earlier the possibility of some Euro-dollar bank lines?

A That's correct.

Q Is it true that you had hopes of obtaining those bank lines from a European source or some additional bank lines?

A I would say that I thought there was a possibility.

Q Did that possibility ever materialize?

A No, it didn't.

Q The possibility, to use your words, died?

A I don't know whether they are my words or not, but the possibility certainly did not materialize.

Q Now, Mr. Lepley, I want to take up in this next series of questions --

THE COURT: Suppose we have a short recess?

(Recess.)

Q Before the recess, Mr. Lepley, you testified about the two $50,000,000 groups of back-up lines, the revolver and the stand-by.

I believe you testified that the first day in which groundwork was laid to make use of the standby lines was February 5, 1970, and I show you Exhibits BW and BZ in evidence.

A What was your question?

Q February 5th was the first date on which you sought to make use in monetary terms of your bank lines?

A Yes, on February 5th.

Q How many banks were involved in the $50,000,000 of revolving credit lines?

A I don't remember the number.

Q I show you Exhibit A-13 in evidence which shows a list of the banks involved in the $300,000,000 revolver. Does that help your recollection?

A Well, it looks like about 45 to 50, somewhere in that neighborhood.

Q Actually, I count 48, but as I understand --

THE COURT: That is a pretty good estimate, isn't it, by the witness?

MR. STITT: It sure is, your Honor. I don't see how it could be closer.

Q Is it your testimony that when it came time to call upon the banks in the revolver portion of the bank line coverage to make good, that they all did?

A That's my recollection, yes.

Q All 45 to 50 banks in the revolver kept their word on their commitment securing the commercial paper?

A That's my recollection.

MR. PIEL: If your Honor please, this misstates the evidence and assumes facts not in evidence. The back-up line that was partially converted to swing line was later taken down, as the witness testified, was not part of the revolver, and there are a fewer number of banks involved in that loan, not 45 or 48.

THE COURT: You mean the $300,000,000 revolver wasn't asked to pick up commercial paper, was it?

MR. STITT: As I understand the testimony, your Honor --

THE COURT: Ask the witness.

Q To clarify the record, Mr. Lepley, is it true that of the $300,000,000 revolver line of credit, $50,000,000 of that sum was segregated or reserved to support the commercial paper?

A That's true.

THE COURT: That's right. Not the 300, just 50.

MR. STITT: 50 of the 300, yes, sir.

THE COURT: Did every bank who was a participant in the 300 participate in the $50,000,000?

THE WITNESS: Yes. Well, they were -- the 50 was a part of the 300, and all of the banks --

THE COURT: They shared proportionate to their interest in the 300 or their commitment in the 300?

THE WITNESS: That's right.

THE COURT: So you are talking about 50,000,000 set up, not 300.

MR. STITT: Yes.

THE COURT: Then your question was misleading before.

MR. STITT: I do apologize to the Court.

TEH COURT: You don't have to apologize.

MR. STITT: I shouldn't ask questions that are misleading.

Q Would you tell us how many banks were involved in the $50,000,000 back-up, Mr. Lepley?

THE COURT: He said the same as were involved in the 300. He just answered that.

MR. STITT: I don't believe that's his testimony, your Honor.

THE WITNESS: No, they were different banks, and I think there were somewhere in the neighborhood of 20, maybe 25.

THE COURT: Wait a second. I just asked you if the same banks in the 300 participated in the $50,000,000 that was set aside in the 300. You said yes.

THE WITNESS: That's true, but you are talking about 50 out of the 300. In addition to that 50 there was another group of banks who provided a 50,000,000 back-up line that was separate from the 300,000,000 involved.

MR. PIEL: If your Honor will look at Exhibit A-13, there are parallel columns --

THE COURT: I don't have it so I can't look at it.

MR. STITT: I show the Court my copy of Exhibit A-13 in evidence.

MR. PIEL: The first column is the revolver, your Honor. The second column is the Euro-dollar revolving credit. The third column is the so-called standby line.

Q Referring to a copy of Defendants' Exhibit A-13 in evidence and directing your attention to the third column entitled, "Lines $50,000,000," could you tell us how many banks were involved in that branch of the bank line coverage for the commercial paper of Penn Central Transportation Company?

MR. PIEL: May I save you time? 26.

MR. STITT: So stipulated.

MR. PIEL: It is in the document.

Q Is it your testimony that in numbers, all but one or two of these 26 banks made good on their commitment?

A That's true.

Q And in terms of dollars, that was 46.5 million out of $50,000,000 coming in to help pay off a portion of the commercial paper holders?

A That's true.

Q So of the $100,000,000 in total bank line coverage, $96.5 million panned out?

A That's true.

Q I am going to call your attention again to Exhibit BW and also BZ, the correspondence and letter agreement with the First National of Chicago, which I believe the record shows -- I am placing before you BW and BZ. Does that refer to the $5,000,000 commitment or share of the First National of Chicago in the back-up lines?

A Was that a question?

Q Yes.

A Yes.

Q Do I understand your testimony to be, and you have those exhibits before you, that this $5,000,000 of the First National of Chicago was going to be taken down by or on behalf of the railroad on Monday, February 9th?

A No, I don't remember that particulat date.

Q I draw your attention to Exhibit BW, Mr. Shaffer's letter to Mr. Corrigan of the First National of Chicago under date of February 5th, and I direct your attention to the third paragraph and ask you whethat that refreshes your recollection?

A Yes, I would say that that refreshes my recollection now.

Q I am now going to place before you from your log, Exhibit BI in evidence, a page for Friday, February 6, 1970 --

you have a copy before you.

Would you turn to the page for Friday, February 6th.

A I have it.

Q I believe Mr. Piel drew your attention on direct examination to the note at the bottom of the page that on Monday, which would be February 9th, Penn Central would buy $10,000,000 back from Goldman, Sachs, using the swing line.

A That's correct.

Q The Exhibits BW and BZ confirm the switch of First National of Chicago's $5,000,000 share of the back-up line to a swing line and for use of those funds on Monday, February 9th?

A Well, certainly the letter from First National of Chicago agrees to setting up the swing line and John Shaffer is unilaterally telling Corrigan that he wants to use the funds on the 9th.

Q If you turn to your log for the page Monday, February 9th, I direct your attention to the notation up at the top of the page, "Buy back February 9th $10,000,000."

A Yes, I see that.

Q Was that buy-back accomplished on that date?

A Yes, I believe it was.

Q That's your best recollection?

A That's right.

Q I ask you, Mr. Lepley, was the $5,000,000 taken down from the First National of Chicago as represented by Exhibits BZ and BW used to buy back half of that commercial paper from Goldman, Sachs on February 9th?

A I don't have a notation on my February 9th sheet that tells me what happened to the swing line on that day, so the only thing I can do is presume that the $5,000,000 was used to purchase half of that -- to premature half of that paper.

Q You can't think of any other explanation?

A No.

Q It is a fact, Mr. Lepley, that you do not know of your own knowledge the reason for that $10,000,000 buy-back by Penn Central from Goldman, Sachs on February 9th?

A I don't remember right now the particular reason for that.

Q You testified on direct examination concerning a previous transaction whereby Penn Central purchased back from Goldman, Sachs on or about December 23, 1969, some $16,000,000 in commercial paper, do you recall that testimony?

A Yes, I do.

Q Did you also testify that at the time of that repurchase you made it clear to Mr. Drypolcher that you would expect Goldman, Sachs to take back this $16,000,000 worth of paper in early January?

A I don't believe I used the expression "take back." To sell it.

THE COURT: I think he used the word "put out."

Q So we have the paper going back to Goldman, Sachs in early January?

A That would be the net effect.

Q Can you refer to your log, Exhibit BI, and tell us the date on which that put-out took place?

MR. PIEL: Your Honor, may I inquire if this is on an issue of the witness' credibility or how it assists the trial? Exhibit CU shows what happened every single day.

THE COURT: You brought it out.

MR. PIEL: I am only saying that if he wants the answer --

THE COURT: You brought it out, I assume it is relevant to the issues.

MR. PIEL: I agree it is. I am just saying the question he is asking is answered without Mr. Lepley having to go through his whole log.

THE COURT: That would be true before you put Mr. Lepley on the stand, wouldn't it?

Objection overruled.

A Your question is, when was the $16,000,000 taken back by Goldman, Sachs?

Q Yes. Can you tell us?

A I don't know whether --

THE COURT: On January 2nd you were asking Shaffer how to do it, right?

THE WITNESS: Yes, I see that, and I certainly remember that we came back up to $200,000,000 after the first of the year.

THE COURT: On January 5th you have a note, "Morgan wants letter confirming purchase of 16,000,000 of our paper."

Does that refer to this putting the 16 back in?

THE WITNESS: No, I would say that probably refers to the $16,000,000 transaction, your Honor --

THE COURT: You still had not done it by January 5th, had you?

THE WITNESS: Apparently not. These aren't the kind of records that are easy to find.

THE COURT: Except that you do have on January 5th that the defendant put $2,050,000 into inventory?

THE WITNESS: Into inventory, that's right. We weren't necessarily asking them to take it back into inventory.

THE COURT: That's what they did with it. What they did with it wasn't your business, was it? As long as you sold the stuff to them, you didn't care what they did with it?

THE WITNESS: That's right.

THE COURT: You were selling to them, weren't you?

THE WITNESS: That's right.

Q Let me direct your attention, Mr. Lepley, to another document in evidence, this is Plaintiff's Exhibit 55 in evidence, and I draw your attention to the first column, "Date," and the third column labeled, "Penn" --

MR. PIEL: Would you give me a moment to get ahold of the document before you question on it?

MR. STITT: Surely, I am sorry.

(Pause.)

THE COURT: I have it. What page? There are about 20 pages --

MR. STITT: About four pages from the bottom, your Honor.

THE COURT: Date?

Q I draw the witness' attention to the dates ranging from December 23rd and the figures in the third column through January 9th, January 13, 1970, and ask you if by examining that exhibit in evidence you can tell us when or by which date the $16,000,000 was put out again to Goldman, Sachs?

A Well, what this tells me is that the inventory of commercial paper of Penn Central, which was down to almost zero on December 24th, actually $400,000, rose again up to $18,850,000 on January 12th. So I would say by the 12th the inventory was up to that level.

Q In any event, there did come a time when the 16,000,000 was put out to Goldman, Sachs?

THE COURT: I see the witness' difficulty. All he can tell you is that their inventory was down to $400,000 on December 24th and was back up to 18 million 850 on January 12th. That's what the exhibit shows.

MR. STITT: Your Honor, maybe I can make a contribution by moving onto another subject.

MR. PIEL: Just before you do, may I point out to the Court that Exhibit CW is the summary computer run. It shows not only the daily inventory, but also the daily outstandings including the inventory and shows the level at which, by a combination of its sales and taking paper into inventory, Goldman, Sachs maintained the ouststandings.

Q Did there come a time, Mr. Lepley, when Goldman, Sachs placed a $5,000,000 limit on the amount of Penn Central commercial paper that it would carry in inventory?

A I believe they placed some kind of a limit, but right now I can't recall the amount.

THE COURT: It is agreed, isn't it?

MR. STITT: I believe it is clear from Exhibit F-3 that this was placed --

THE COURT: Everybody is agreed that there was a limit --

MR. STITT: — on February 6th.

MR. PIEL: And exceeded.

Q Mr. Van Cleave testified, and I believe Exhibit BI confirms his testimony, that on or about March 2nd, after this limit had been placed, the Goldman, Sachs' inventory on that date rose to approximately $9,000,000. Would you look at your notes, Mr. Lepley, Exhibit BI in evidence, for March 2nd, and let us know whether you can find any notation that might shed light on that occurrence?

A I have here on my notation for that day, March 2nd --

Q Would you read it to us, please?

A "Goldman, Sachs is not supposed to go over $5,000,000 in inventory, per George Van Cleave from Jonathan O'Herron. Van Cleave is doing the 9,000,000 on his own."

Q Is that in quotes, "on his own"?

A In quotes, "on his own, in view of only $250,000 tomorrow." That means only $250,000 roll-over tomorrow.

Q Would that mean that Van Cleave was going up to $9,000,000 for the night of March 2nd in anticipation of being able to reduce it on the following day, since only a quarter of a million dollars would be coming in for roll-over?

A That's what it means to me.

Q Would you look at Exhibit F-55 or any other documents that you have there and let us know whether that inventory was reduced below 9,000,000 on March 3rd?

A Well, I don't have March 3rd. I have got March 4th here. March 4th indicates that it has -- inventory is down to $3,050,000.

THE COURT: What's the point of that, Mr. Stitt?

MR. STITT: Your Honor, this was testimony that I tried to elicit from Mr. Van Cleave. I had had knowledge of this notation in Mr. Lepley's notes, but I did not get a firm answer or an answer that I did not judge to be firm from Mr. Van Cleave, and so I took it up with Mr. Lepley.

THE COURT: Regarding what?

MR. STITT: That this March 2nd inventory of $9,000,000 was a unique situation.

THE COURT: Exhibit 55 speaks for itself, doesn't it?

THE WITNESS: Yes, sir, it does.

THE COURT: He went over 5,000,000 on March 30th, March 31st, April 1st, April 2nd, April 3rd, right?

MR. STITT: If that's what the exhibit shows, yes, sir, and I am sure it does, since your Honor has just read those figures.

Q Did there come a time when there was a run-off in the commercial paper of Penn Central Transportation Corporation?

A A run-off, you mean when there were no sales made, is that what you mean?

Q When maturities exceeded whatever sales you were able to make.

A Yes, there did come a time.

Q Were you present in court yesterday when Mr. Sullivan of the Manufacturers Trust Company testified?

A Through at least part of his testimony.

Q Were you present when I asked him to give the reasons and the facts surrounding the withdrawal of the $100,000,000 proposed debenture issue of the Pennsylvania Company originally scheduled for May, 1970?

A I don't remember that question.

Q Were you present when he related the termination of that proposed issue to the commercial paper run-off and the publication of Penn Central's earnings on or about

April 23, 1970?

A I don't remember that testimony.

MR. PIEL: Excuse me. I object on the ground that it assumes a fact not in evidence, that Mr. Sullivan so testified. It may have been related temporally. It wasn't related causally.

THE COURT: He said yes, this is the bridge loan, isn't it, the so-called bridge loan?

MR. PIEL: No. The bridge loan was taken out, it was supposed to be a bridge loan until there would be a public financing in May, which, as Mr. Stitt says, did not take place.

MR. STITT: I believe that was Mr. Sullivan's testimony.

THE COURT: Mr. Sullivan said the first quarter earnings.

MR. PIEL: Came out on April 22nd.

THE COURT: This plus the tight market cancelled it.

Q Would you give us the facts concerning the run-off of Penn Central Transportation Company commercial paper?

THE COURT: What do you mean, the facts?

Q When it started, the factors related to it, what caused it, and the other surrounding circumstances, as best you can give them to us, Mr. Lepley.

MR. PIEL: If he knows. I take it this doesn't call for speculation. May I point out, your Honor, that the facts as to the declining sales are in the exhibit, so the witness doesn't have to be taxed by that. He could have his attention drawn to it.

THE COURT: Do you want to answer the question?

Q You may refresh your recollection by referring to Exhibit BI.

A I will have to do that, Mr. Stitt. We were still having sales on March 20th, April 16th were sales. It looks to me like we started to run into a little bit of trouble around April 23rd. There were no sales made on that day. There was about almost a $2,000,000 roll required.

Q Was that the date of the publication of the Penn Central loss, and I show you Exhibit EH to refresh your recollection?

A Well, this is labelled the 23rd. I assume that's the date of the release of the profit and loss statement.

Q Continue.

A Then after April 23rd there was a sale on the 27th --

Q Is that a one day sale?

A That was a one day maturity, that's right.

There were no sales, no sales, and then there were some sales here on April 30th.

Q That was two sales, one for four days and one for six days?

A That's right, a total of $2,000,000. Then there were some more sales on May 1st.

Q You had four notes sold on that date of what might be described as normal maturities?

A Well, no. Actually one of them I would say is an abnormal maturity. It is 199 days, which is very unusual.

Q And the others went for 60, 90 and 100 days?

A 3 and a half million went for 40 days, which, again, is a fairly long period of time. No, I am sorry, I was looking at the prepayments. There was a 5,000,000 sale for 165 days, which, again, is unusually long. Then the rest of them, 2,000,000, 2,000,000, 300,000, they seem to be about an average maturity length.

Q How many sales did you have after May 1st?

A It looks like May 5th there was one sale. May 6th, there was one sale -- no, no sales on that day.

Q Isn't it true that you only had two sales after May 1, 1970?

A I don't know until I look through here, Mr. Sitt.

Q Please look.

A I see one more sale on May 11th. Then I see a sale on May 13th, and May 13th was the last sale.

THE COURT: That makes a total of how many?

THE WITNESS: I think about three, your Honor, since May 1st.

Q Did there come a time when your bank lines were exhausted?

A Yes, there did.

Q When did that occur?

A I don't remember that date either.

Q Did there come a time when your cash to cover maturities, apart from your bank lines, was exhausted?

A Yes, there did.

Q When did that time come?

A I would say that that would be June 20th, the date of our reorganization.

Q Were you consulted in connection with the preparation of the reorganization petition filed on June 21st?

A No, I was not.

Q Were you asked to prepare any figures or to give any information in connection with that matter?

A Not that I can remember.

Q I show you Exhibit F-94 or a copy thereof, and I must apologize for some of the quality, but I believe it is legible, Mr. Lepley, and I direct your attention to [illegible] paragraph 3 of F-94 and I ask you whether you can find in that paragraph a reference to the commercial paper note of the Franklin Savings Bank maturing June 26, 1970?

MR. PIEL: If your Honor please, your Honor has previously sustained an objection to this document, and the facts as to the maturity of the notes outstanding appears in Exhibit CU.

THE COURT: F-94 is not in evidence.

MR. STITT: No, sir. I do intend to offer it.

THE COURT: You put on the record that it is in evidence.

MR. STITT: I am sorry, your Honor, I do apologize. It is not in evidence.

MR. PIEL: It has previously been offered.

MR. STITT: Oh, yes, that's true.

THE COURT: I know that, but his question assumed it was in evidence.

MR. STITT: That was an error on my part.

THE COURT: What is your next point?

Q Do you find a reference in F-94 for identification to the Franklin note due on June 26th?

MR. PIEL: Objection, your Honor, irrelevant.

THE COURT: Sustained.

Q Do you recognize Exhibit F-94 for identification, Mr. Lepley?

A I believe I saw it once some long time ago.

Q This is a copy that you have seen?

A I really can't say, it has been so long since I saw the document.

MR. PIEL: The objection was not on grounds of authenticity, your Honor.

MR. STITT: I offer Exhibit F-94 in evidence, your Honor.

MR. PIEL: Objection.

THE COURT: Same objection, same ruling.

Q Can you tell us, Mr. Lepley, how much commercial paper was outstanding as of June 21, 1970?

A If my memory serves me correctly, it was in the neighborhood of 86 and a half million dollars.

Q Somewhere in that range?

A In that range.

Q Could it have been $82,530,000?

A It could have been.

Q But that's your recollection, in that range?

A It was in the 80 millions.

Q You also testified on direct examination that you purchased commercial paper for the account of some Penn

Central subsidiaries. Is that true?

A That's true.

Q I believe this was using a portion of the proceeds from the $50,000,000 Pennsylvania Company financing in December of 1969?

A I don't necessarily tie one to the other.

Q And you purchased this paper from one dealer, and that was Goldman, Sachs?

A Well, dealer paper was purchased from Goldman, Sachs. Direct issue paper was purchased from others, like GMAC, General Electric.

Q So you did make some direct issue purchases?

A Yes.

Q General Motors, do you recall any others?

A I believe General Electric, Sears Roebuck, maybe Chrysler.

Q But the paper you purchased through dealers was through Goldman, Sachs?

A That's true.

Q Would you tell us what grade of paper you were looking for?

MR. PIEL: Objection, your Honor, irrelevant.

THE COURT: Sustained.

Q Did you buy any Penn Central Transportation commercial paper?

A No.

Q Present with you on December 7, 1969 -- this will be a different line of questioning -- at Goldman, Sachs, was Mr. Loder, the assistant vice-president for investments, Mr. Verlander, director of corporate financing, and yourself on the Penn Central side?

A That's right.

Q I don't know that we have your title at that time in the record.

A My title was assistant treasurer.

Q And you met with Mr. Van Cleave and Mr. Drypolcher on that date?

A That was my recollection.

Q Was a Mr. Jack Vogel also present at that meeting?

A He could have been, but I don't remember specifically.

Q I direct your attention to the Goldman, Sachs blue sheet for this meeting, Exhibit F-9 in evidence, and the reference to J. A. Vogel some seven or eight lines up from the bottom.

Does that refresh your recollection that Mr. Vogel was there on December 9th?

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A No, because I just don't remember Mr. Vogel.

Q During the course of that meeting was there any inquiry from any of the Goldman, Sachs representatives, including Mr. Vogel, as to Penn Central's third and fourth quarter earnings for 1969?

A I don't remember that. I don't think that they asked us about our financial status.

Q Was there any inquiry at that meeting concerning the earnings projections for 1970?

A I don't think there were.

Q Was there any inquiry concerning the status of your accounts receivable?

A No.

Q Was there any inquiry concerning the status of your working capital?

A Not that I can remember.

Q Was there any inquiry concerning the degree of encumbrance of the assets of Penn Central Transportation?

A No.

Q Or any of the other companies?

A No.

Q Was there any inquiry as to the cash position of Penn Central or Penn Central Transportation?

A Not that I can remember.

Q Was there any inquiry concerning your cash position projections for 1970?

A Not that I can remember.

Q Was there any inquiry concerning your compensating balance requirements?

A No, I don't remember that.

Q Was there any inquiry concerning the ratio of your current assets to current liabilities?

A No.

Q Was there any inquiry concerning the use of the proceeds of the sale of an additional $50,000,000 of commercial paper which had just been authorized by the ICC in November?

A What was that question, on the use of the proceeds?

Q Yes.

A I don't remember that subject coming up.

Q Was there any inquiry concerning the ICC report approving the issuance of that paper in November, 1969?

A I don't remember that.

Q Were you told anything with respect to Mr. Vogel's role at Goldman, Sachs?

A I don't remember.

Q Do you have any idea as to why he attended the meeting of December 9th?

MR. PIEL: If your Honor please, the witness said he didn't remember. We concede that he was there, but it is not in the witness' recollection.

THE COURT: Sustained.

Q Is it true that Goldman, Sachs never made any inquiries of you concerning the financial circumstances of Penn Central?

A That's true.

Q And are you aware of any credit investigation by Goldman, Sachs at any time during 1969 or 1970 of Penn Central?

A No, I am not aware of it.

Q Mr. Lepley, I am going to request your assistance, if you can give it to me, in identifying some documents and then I am going to let you go.

I show you Exhibit F-79, I believe for identification, your Honor, but if I am in error and it is in evidence, I apologize to the Court.

THE COURT: It is being held for Mr. Lepley's testimony.

MR. PIEL: That is the note?

THE COURT: This is a letter to Mr. Loder dated December 4, 1969, signed by Mr. Lepley. F-79.

MR. STITT: December 1 is the date I have, your

Honor.

Q Mr. Lepley, I show you a document which is now labeled Exhibit F-79 for identification and was labled PLE-2 at your deposition of May 22, 1973.

I ask you to examine that document and, if you can, would you tell us what it is?

(Pause.)

A This is a letter from me to my then superior, Bob Loder.

Q Did you write this letter or memo to Mr. Loder on or about the date indicated in the usual course of business?

A Yes, I would say that.

MR. STITT: Your Honor, on the testimony of this witness, I offer Exhibit F-79 for identification in evidence.

MR. PIEL: I object, your Honor. Irrelevant to the issues.

THE COURT: Overruled.

(Plaintiff's Exhibit F-79 was received in evidence.)

Q I show you a document dated February9, 1970, Exhibit F-70 for identification in this case, also marked PLO-3 at the examination of, I believe, Mr. Loder, on May 22, 1973.

I ask you to examine it, and, if you can, please tell us what it is?

A This is a memorandum by my then superior, Robert Loder, dated February 9, 1970.

Q Do you find his initials on the second page?

A Yes.

Q I draw your attention to some handwriting up in the left-hand corner. Could you read that and if it has any significance, tell us what it is?

A The name is Charlie Hill, who at that time was the comptroller of the company. I don't know what the significance of it is.

Q But Mr. Hill was with the company at that time?

A Yes.

MR. STITT: I offer F-70 in evidence.

MR. PIEL: Your Honor has previously excluded this document. It is not binding on Goldman, Sachs. It is opinions exchanged between people not brought to Goldman, Sachs' attention and therefore irrelevant.

THE COURT: Who is Pat Bowditch?

THE WITNESS: I think Pat Bowditch was with First National City Bank, your Honor, but I am really not sure of that.

MR. STITT: There has been testimony in this record about Mr. Bowditch and his relationship with First

National City and his function regarding --

THE COURT: I merely asked the witness a question. I don't know what you are talking about.

MR. STITT: I am sorry, your Honor. I thought the question had been answered.

THE COURT: I am going to let it in.

(Plaintiff's Exhibit F-70 was received in evidence.)

Q Mr. Lepley, I believe you testified on direct that until coming to Penn Central in November, 1969, you had not had any previous experience in handling commercial paper?

A That's true. About the only experience I had was occasionally to fill in for the assistant treasurer who was in charge when he was on vacation.

Q That was with your previous company, Atlantic Richfield?

A That's right.

Q When you came to Penn Central, did you find in the files a memorandum concerning commercial paper issuance and procedures?

A I went through their entire file on the subject of commercial paper.

Q Do you remember finding a memorandum from Goldman, Sachs, concerning commercial paper issuance?

A Yes, I do.

Q Was that memorandum from Mr. Peter Fisher of Goldman, Sachs?

A I believe he was the author of that memo.

Q I show you Exhibit F-35 for identification, also marked Exhibit PLE-1 at your deposition on May 22, 1973, and I ask you if this is the document or a copy thereof to which you referred?

A This appears to be the document, yes.

Q That is your recollection?

A That's right.

Q You found this in the files of the Penn Central?

A I believe that was the memo that I saw.

MR. STITT: Your Honor, on the testimony of this witness, I ask that Exhibit F-35 for identification be received in evidence.

MR. PIEL: If your Honor please, your Honor previously excluded this, not on grounds that we didn't know what it was, but on grounds of being so far out of time as to be irrelevant here. There is no date on it, so we don't actually know where it is, but the chart attached goes to 1967.

MR. STITT: Yes, I would say through mid 1967.

THE COURT: Objection sustained.

Q Mr. Lepley, this document, Exhibit F-67, and the others which I will show you, all predate your association with Penn Central, commencing in November. But I show you Exhibit F-67 for identification and ask you if you can tell us what that document is?

A This appears to be a letter from Jim O'Brien of Solomon Bros. to Jonathan O'Herron, our vice-president of finance, dated September 25, 1969.

Q You say Jim O'Brien. Have you had any contact with Mr. O'Brien?

A No, I just used that because I heard others use that name.

Q Has this document ever been brought to your attention before this moment?

A No, this is the first time I remember seeing it.

Q Are you familiar with Mr. O'Brien's signature?

I take it you are not.

A No, no.

Q I show you a couple of documents clipped together, one a first draft and one some other draft, labeled F-68 for identification. I ask you if you can identify that document for us?

A This looks to be the text of a speech --

MR. PIEL: Excuse me, your Honor, I don't think the witness should say what it looks to be.

Q Have you ever seen that document before?

A I don't remember having seen it.

Q Do you recognize any handwriting on it?

A No.

Q I show you Exhibit F-69 and ask you if you can identify that document or any of the handwriting or indicia on it, whether it has ever come to your attention before? It is F-69 for identification.

A No, I don't remember having seen this.

Q Just a couple more. Exhibit F-71 for identification, marked PLO-8 at the deposition of Mr. Loder on May 22, 1973.

THE COURT: Objection sustained. We have been through this, Mr. Stitt. You don't have to keep going over it again.

Q If he happened to see it, it wouldn't make it admissible.

Q I show you Exhibit F-74 for identification and ask you if you have ever seen that document before? If so, where?

THE COURT: Objection sustained.

A I don't remember ever seeing it.

MR. STITT: That completes my examination of this

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witness, your Honor.

THE COURT: 2:15.

(Luncheon recess.)

AFTERNOON SESSION

(2:15 p.m.)

RAYMOND LEPLEY, resumed.

REDIRECT EXAMINATION

BY MR. PIEL:

Q Mr. Lepley, in answer to Mr. Stitt's questions about your dealings with Goldman, Sachs from day to day and the management of the sale of the commercial paper, you said that you were fairly confident that you discussed with them all sales made that day on any particular day.

A That's true.

Q Were you talking about sales made by Penn Central to Goldman, Sachs?

A That's true.

Q Did you talk to them about each sale that they made to an investor?

A No.

Q And if you arranged with them to sell them a commercial paper note, did you know what investor was going to get it?

A Perhaps once or twice out of my entire --

THE COURT: Wait, wait. I didn't assume when that document was introduced that you referred to that the witness knew who the purchaser was. But he did get from

Goldman, Sachs the individual sales that were made by them, because he had to know it.

MR. PIEL: He wouldn't have to know, your Honor --

THE COURT: To let Morgan know what to release. He had to know it.

MR. PIEL: That would be the amount and the maturity.

THE COURT: That's right. That is all that document shows.

MR. PIEL: There is no question about it.

Q I am just trying to clarify one point in the witness' testimony, and that is the discussions that he had were about releasing notes from Morgan to Goldman, Sachs, regardless of what Goldman, Sachs was thereafter going to do with the note, is that correct?

A Well, I didn't follow your question.

THE COURT: You didn't know to whom Goldman, Sachs was selling that note? You were just interested in getting the amounts of each note for your record. Is that right?

THE WITNESS: Just occasionally I knew who they were selling them to.

Q By chance?

A By chance.

THE COURT: I didn't think any different.

MR. PIEL: I think Mr. Stitt was endeavoring to make a kind of connection here --

MR. STITT: Mr. Stitt was not trying to do any such --

THE COURT: Mr. Stitt, nobody called upon you to say anything.

MR. STITT: I am sorry, your Honor.

Q Mr. Stitt asked you whether the confirmation of your instructions to Morgan Guaranty were later put in writing and mailed to them. You said yes.

A As far as I can recall, yes.

Q If you advised Morgan Guaranty to deliver certain notes for amounts and maturities to Goldman, Sachs, this written confirmation would be put in the mail to them thereafter, is that right?

A Probably the same day.

Q It would be received by Morgan in the normal course on some later day?

A That's true.

Q So that by the time they got the confirmation for their file, the transaction had already taken place?

A That's true.

Q The note had been delivered and paid for?

A That's true.

Q Goldman, Sachs had owned it the day before and could do anything with it they wished, is that right?

MR. STITT: I object to the form of that question.

MR. PIEL: I withdraw it.

Q A propos of another question by Mr. Stitt, just a small point, I want your language as quoted by him to be clear. In your deposition, Page 49, taken May 22, 1973 in this matter, and with reference to your meeting with the Goldman, Sachs people in New York on December 9, 1969:

"Question: Do you recall anything that you said at the meeting of December 9th?

"Answer: I inquired a little bit more deeply on the number of customers that they might have that had 100 percent back-up.

"Question: Can you recall why you did so?

"Answer: I wanted to make sure when we got to the office," meaning your office?

A Yes.

Q "that we could report that indeed we were more or less sticking out like a sore thumb among Goldman, Sachs' customers, not having a high percentage of back-up."

Did you so testify?

A I remember that.

Q Is that in accord with your present recollection?

A Yes, it is.

MR. STITT: Do you want to read the next question and answer?

THE COURT: That's really immaterial. I made it clear this morning that we are taking what the witness has said from the stand here now, not what he said in the last trial.

MR. PIEL: This was a deposition in this matter, your Honor.

THE COURT: But what does that have to do with question put to him live in the trial? He admitted that those are the words he used. Now you are trying to have him change the words he used?

MR. PIEL: No.

THE COURT: Then let's go on to something else. It really is not important, is it? Whether it is like a sore thumb makes no difference. They were not typical of what Goldman, Sachs was doing.

Q Prior to the filing of the petition for reorganization, had you had any responsibility on behalf of Penn Central for dealing with the banks in regard to the arranging of loans and credits apart from your management of the day-today swing line matters?

A Well, I dealt with one particular bank that I can remember in Philadelphia, the Fidelity Bank, on an individual loan, yes.

Q Through one of the subsidiaries?

A It was for Buckeye Pipeline Company.

Q But with regard to arranging any of the credits or loans that we were looking at here this morning on these exhibits, that was done by other persons?

A That's true.

Q Were you familiar with the lending limits of all of the banks that loaned to Penn Central or with whom they had credit relations?

A Oh, no, not all the banks, no.

Q So that your personal opinion that you mentioned of the Penn Central being heavily loaned wasn't based on an examination of all of the banks or the relations of their lending to Penn Central to their loan limits?

A No.

THE COURT: I don't think he was talking about what the banks' margin was open. He was talking about could Penn Central get any more money on loans because of their condition. Wasn't that what your answer was directed toward?

THE WITNESS: I said that I didn't think that we could get much if any more, in the domestic market.

THE COURT: That had nothing to do with the ability of the bank to lend on limits.

MR. PIEL: We have questions of loan limits and questions of tight money.

THE COURT: Ask him, if it is bothering you, but that isn't what he was talking about on his cross-examination, bank limits.

Q I ask you to look at Page 100 of your deposition taken in this matter on May 22, 1973, if you will look over what you said there --

(Pause.)

Q Did you have the opinion on March 3, 1970 --

A Yes, I did.

Q What was your opinion on March 3, 1970?

A That it would be difficult to arrange a domestic line of credit.

Q Not impossible, but difficult?

A That's right.

Q Did you have any opinion on the subject in December, 1969?

A Well, I said at thattime no, I did not.

Q How long had you been with Penn Central?

MR. STITT: I don't believe that's a response to the question, your Honor. He wasn't asked what he said. He was asked whether or not he had a view in December, 1969.

Q Yes, in December, 1969, did you have an opinion on this subject?

A I don't believe I had formed an opinion as early as December, '69.

Q You had just come with the company a little while before?

A I had been with the company only since November 19th, or so.

Q Who in the railroad was actively in charge of dealing with banks with regard to loans and lines of credit and determining the acceptability of the Penn Central credit with the banks?

A That would have been Mr. Bevan and Jonathan O'Herron and possibly John Shaffer also, the treasurer.

THE COURT: What was your knowledge as to these matters? You were here as head of the commercial paper department, weren't you?

THE WITNESS: Yes, sir, I was.

THE COURT: What made you come to a conclusion that you claim you came to certainly by the spring?

THE WITNESS: I came to that conclusion based on the very difficult market that I saw from my reading of the Wall Street Journal, talki with various people, a difficult market for funds, that funds were extremely difficult to come across. I also came to that conclusion from knowing the extent of our bank lines, the number of banks that we dealt with.

THE COURT: In other words, it was from your intimate knowledge of the financial condition condition of Penn Central that you came to the conclusion of "extremely difficult"?

THE WITNESS: I don't know whether you would call it intimate, your Honor. As I say, I came to the company in November of 1969.

THE COURT: We are now talking about five months later.

THE WITNESS: In five months I didn't have an intimate knowledge of the financial structure of the company.

BY MR. PIEL:

Q Were there other assistant treasurers, Mr. Lepley?

A No, I don't believe there were.

Q But the hierarchy with regard to financial matters was Mr. Bevan as chief financial officer?

A That's right.

Q Mr. O'Herron as financial vice-president?

A That's right.

Q Mr. Loder as treasurer?

A No, Mr. Shaffer as treasurer.

Q Mr. Shaffer as treasurer. Mr. Loder was what?

A Assistant vice-president, corporate finance.

Q Then you were given certain assignments as assistant treasurer?

A That's right.

Q That did not include following the overall financial condition of the railroad or analyzing it?

A That's true.

Q Was your recollection two years ago when your deposition was taken perhaps a little fresher than it is now?

A I'd say it was two years fresher, yes.

Q Were you asked this question and did you give this answer on your deposition at Page 106:

"Question: Was there any discussion" -- I will have to find what meeting is being referred to here.

The December 9, 1969 meeting is being referred to here.

MR. STITT: I believe that is the meeting in Philadelphia following the December 9th meeting. This would be a meeting in Philadelphia with Loder, Shaffer and O'Herron.

Q Following the meeting with the Goldman, Sachs people.

"I believe you said there was some discussion at that meeting about bank lines, is that correct?

"Answer: Yes.

"Question: I believe you said that it would be difficult to get additional back-up lines" --

MR. STITT: Page, please?

Q 105.

"difficult to get additional back-up lines by your domestic banking connections?

"By that were you referring to the banks from whom Penn Central already had line coverage?

"Answer: Yes, that represented a substantial part of the banking institutions in the United States.

"Question: Was there any discussion at the meeting about obtaining additional line coverage from other banks?

"Answer: Foreign banks, yes.

"Question: Was there any discussion about obtaining additional line coverage from other domestic banks?

"Answer: Not that I can remember.

"Question: When you used the words 'loaned up,' are you referring to the legal lending limits of the banks involved?

involved?

"Answer: Yes.

"Question: Was there any discussion at the meeting with Loder, Shaffer and O'Herron about the Pennsylvania Company obtaining bank loans?

"Answer; I don't recall any. There obviously must have been meetings, but I can't refer specifically to a meeting."

Did you so testify?

A Yes, I did.

Q With respect to Euro-dollar loans, you said that at one point they were considering something that there was a prospect of arranging but then they died or the idea died. This is the Euro-dollar back-up lines, you are talking about?

Q The idea of going out for additional lines and of seeking it in the Euro-dollar market.

A Right. Your question is?

Q I was first just directing your attention to your previous testimony preparatory to a question.

Did you assist one of the financial officers in a trip to New York to investigate information about how to go about getting Euro-dollar lines?

A Yes, I did.

Q Who was that?

A John Shaffer.

Q When did that occur?

A That was in the spring some time.

Q Let me ask you to look at Exhibit EB for identification, which was Exhibit 5 on your deposition.

Have you examined that?

A Yes.

Q Was that written by you to Mr. O'Herron on April 2, 1970?

A Yes, it was.

Q At that time did you reach a conclusion as to whether or not Penn Central would be able to obtain Euro-dollar back-up lines?

A I thoguht that it might be possible to arrange one.

Q Did you reach a conclusion that it could probably be done?

MR. STITT: Objection to the form of the question. Suggestive, leading.

THE COURT: Overruled.

A I reached the conclusion that it might be possible. That's about the best I can say.

Q Let me read you a question and answer by way of refreshing your recollection, Page 30, of your deposition.

"Question: In the course of your investigation of Euro-dollar back-up, did you ever reach a conclusion as to whether or not Penn Central would be able to obtain Euro-dollar back-up lines?

"Answer: I reached a conclusion that it could probably be done."

This I just point out to you, Mr. Lepley, this was after showing you this same memorandum of April 2nd to John O'herron.

Does that refresh your recollection that that was your view of the matter at the time?

A Yes, it does.

Q It does?

A Yes.

Q And to that effect?

A Yes.

Q So when you said this morning that it died, you meant at some time subsequent to this?

A Yes.

Q Would that have been in May when the public financing was withdrawn?

A It certainly would have been subsequent to April 2nd. I can't pin it down.

Q Did any European bank or European branch of an

American bank ever decline to eldn money to Penn Central?

A No.

MR. STITT: I object to the form of the question. He ought to establish whether any were asked --

Q That's going to be the next question.

Did you ever ask for any of them?

A We never asked for a Euro-dollar back-up line.

Q So when you said it died, what did you mean?

A The possibility of arranging one, it died.

Q How did you know it died?

A I never got a response from O'Herron.

Q You mean it died on his desk?

MR. STITT: I object to the form of that question.

THE COURT: Wait, wait. The impression I received from the testimony this morning was that it died because nobody on the outside wanted to do it, that you wanted it done but somebody else didn't do it. Now you are telling me it died internally, it never got off the ground inside?

THE WITNESS: If that's the impression you got, your Honor, it was not one that I meant to convey. That's not true.

Q It did die inside?

A Yes.

MR. STITT: Objection to the form of the question.

THE COURT: Overruled.

Q Did Mr. O'Herron ever -- you say he made no response to you?

A No. "I told him in my April 2nd memorandum, "We owe Mellor an expression of our interest," and we never did.

Q You never gave him --

A We never gave him an expression because I could never get anything from O'Herron.

Q So whatever was in his mind or consultations with others relating to this, you can't tell?

A That's right.

Q On the subject of returning from inventory to you by Goldman, Sachs that you have told us about and that we have seen reference to in Exhibit BI, did anyone at Goldman, Sachs ever say anything to you that led you to believe that any of the returns from inventory were done for credit reasons?

A Done for credit reasons?

Q On the part of Goldman, Sachs for the creditworthiness of Penn Central.

A No, no.

Q Did anybody at Goldman, Sachs ever express to you the view that any of the returns of paper from Goldman, Sachs' inventory to you were done because of worry on the part of Goldman, Sachs about the creditworthiness of Penn Central?

A No.

Q Now, if I may, I would like to direct your attention again to the meeting in New York with Goldman, Sachs' people on December 9, 1969, and for the purpose of this question, ask you please to look at Plaintiff's Exhibit F-9, which is the blue sheet, Goldman, Sachs' blue sheet record of the meeting, part of the credit file, Exhibit A.

Do you see the second sentence, "The purpose of his visit" --

A Yes.

Q Wait a minute. I was reading from the wrong one, but I guess it says that in the other one, too.

In the third sentence, December 9, 1969 blue sheet: "The purpose of the meeting," and read the rest of that sentence.

A I have read it.

Q I want to ask you whether that refreshes your recollection as to what the purpose of the meeting was?

A Yes, it does.

Q What was the purpose of the meeting?

A To discuss the overall commercial paper relationship between us and Goldman, Sachs and bank borrowings, and I would take the bank borrowings to mean the back-up lines.

Q Mr. Stitt asked you a number of questions about whether or not the Goldman, Sachs people had made inquiry of you at that meeting.

A Yes.

Q About accounts receivable, encumbrances, working capital, cash position, ratio of assets to liabilities, and the like, use of the proceeds, encumbrances.

Mr. Lepley, were you an appropriate person to be asked that kind of question if they wanted to get that kind of information?

MR. STITT: I object to the form of that question. I also point out there were two other Penn Central financial officers --

MR. PIEL: I am going to come to that, Mr. Stitt, right away.

THE COURT: Objection overruled.

A No.

Q Was Mr. Ted Verlander an appropriate person to be the source of that information?

A No.

Q How about Mr. Bob Loder, assistant vice-president, investments, he is called here.

A Possibly, but in my opinion he wouldn't be the right person to ask.

Q Who would be the right person to ask, person or persons?

A Mr. Bevan or Jonathan O'Herron. I think those two.

Q You don't know how often Goldman, Sachs' people were in touch with them, do you?

A No, I don't.

Q Let me ask you now, you are familiar with the Moody Transportation Manual?

A Yes.

Q You know in general the kind of information that appears in it?

A In general.

Q And the kind of information that appears specifically about Penn Central?

A Yes.

Q And appeared back in those days, 1969 and '70?

A Yes.

Q If one wanted to examine the figures on accounts receivable in the system, could you find it there in the current edition of Moody's?

A Yes, you could.

Q And working capital?

A Yes, you could find that.

Q Cash position?

A Yes.

Q The ratio of assets to liabilities?

A Yes.

Q Encumbrances on properties?

A I think that each mortgage has a description of the underlying collateral.

Q In Moody's?

A In Moody's, yes.

Q I show you Plaintiff's Exhibits 76, 77, and 78 in evidence. These are three communications from Mr. Underhill -- who is he?

A I believe Underhill at that time was in charge of the budgeting operation.

Q Did he have a title of director, budgetary administration?

A He could have. He was in charge of the budgets.

Q Have you ever seen these documents before I showed them to you a few minutes ago?

A No, I never saw F-76. I never saw F-77. I don't believe I saw F-78. I don't believe that I had ever seen any of these.

Q This is putting your mind back to the early part of 1970. Did you see any studies or reports or whatever you want to call this thing that it is in this form?

You notice all three are in the same form?

A Yes, I noticed that.

Q Did you see any information in that form?

A I don't remember seeing information in this form, no.

Q Even though you were the assistant treasurer?

A That's true.

Q Will you tell us who the gentlemen are to whom this was addressed? We know some of them already. Gorman, the president.

A Gorman was president. Mr. Bevan was the chief financial officer. I believe Flannery and Large were operating vice-presidents. O'Herron, of course, was the vice-president in charge of finance. Basil Cole was the chief legal officer and Charlie Hill was the comptroller.

Q Do you know whether or not that group constituted some kind of a standing committee for some purpose?

A I really don't know.

Q Based on your experience with the company from the time you joined it up until the time of the reorganization petition -- I withdraw that for the moment and ask you first to notice the character of this document, pick any one of them because I am not talking about specific figures in it, but the kind of a document that it is, what does it appear to you that this document does in terms of conveying information to that small group of top men?

A Well, it gives the very latest forecast of financial results and also lays it out against the financial plan for the same period of time and also against the primary same period and shows the variance of the current forecast from either the financial plan or the prior year.

Q Are you looking at F-76 when you say that?

A Yes, I am.

Q F-76 is dated February 6, 1970, is that right?

A Yes, it is.

Q So that the quarter that they are talking about is about one-third done at that point?

A That's approximately right, yes.

Q Now that you are treasurer of this company today in its present operations, do you deal with this kind of information?

A I look at it, but I don't really deal with it. I am more interested in cash.

Q As treasurer, you manage the funds and let other people worry about the financial planning, is that it?

A I wouldn't say I let other people manage the funds. I am managing the funds.

Q That's what I mean.

A But as far as the profit and loss statements go, it is not of too much help to me. I am more interested in source and application and receipts and disbursements.

Q Based on your experience with this company, is this document a kind of information which the management would give to outsiders when they are discussing with outsiders the financial condition and prospect of the company?

MR. STITT: If your Honor please, I must object to this question. This witness was not a distributee of this document. I don't believe that any proper foundation has been laid for him to give an opinion, particularly five years after the event.

THE COURT: Overruled.

A It would be difficult for me to really answer that question. I think the information that is shown here is probably confidential and also based on a lot of suppositions, and I don't know whether we would want to -- I just don't know whether we would want to release that kind of information or not.

Q Mr. Lepley, if you are one month through a quarter of a year, the railroad did cast up its accounts quarterly, did it not?

A Yes, it did.

Q And publish the results quarterly?

A Yes, it did.

Q How long after the end of a quarter does it take before you are really in a position to announce what you did?

A I guess back in those days, probably about a month.

Q In the meantime are you depending on incomplete information from different parts of the system?

MR. STITT: I object to the form of that question.

Q What do the financial officers depend on to make these estimates?

A They would depend on information coming from various parts of the system in order to get all of the items of expense and revenues.

Q Do you really know what it is until after you close the books for the quarter?

A The actual results? No, no, you don't.

Q It is a planning guide and aid on an estimated and guesstimate basis, isn't it, Mr. Lepley?

MR. STITT: Objection to the form of that question.

THE COURT: Overruled.

A I would say it would be mainly for use in planning, yes.

Q I show you Exhibit AZ in evidence. Have you ever seen that document before today?

A I don't remember having seen this kind of a document, no.

Q You don't --

A Or this document. I don't remember.

Q You have answered my next question, which is whether in the early -- in late '69 or early '70 you saw any reports in this form containing this kind of forward financial planning information?

A I don't remember ever having seen anything like this.

Q Even though you were assistant treasurer?

A That's right.

Q Again, based on your experience with this company and its management and its practices and its procedures, is this the kind of information which in this form or in this detail would be given out by the financial officers of the Penn Central to persons on the outside with whom they are having discussions?

MR. STITT: I object to the form of the question, your Honor. It is beyond the province of this witness. I don't believe a proper foundation has been laid. It is five years after the event.

THE COURT: Overruled.

A I would answer it the same way I answered the other one. I don't believe that this information would be divulged outside the company.

Q F-70 was received in evidence this morning, I believe. It is dated February 9, 1970, a memorandum by Mr. Loder. In the fourth paragraph it says that Mr. Pat Bowditch of the First National City Bank requested in connection with discussing extension of more credit to Penn Central a number of changes in the proviions of the revolving credit agreement.

Do you see that?

A Yes.

Q Were such changes ever made? Was it the last amendment of the revolving credit agreement in September, 1969?

MR. STITT: I object to the latter part of the question as leading, your Honor. I thought a question ws already before the witness.

THE COURT: That's true.

A I don't remember those modifications having been made, but that's about the best I could tell you.

Q Isn't it a fact that instead of pursuing that discussion with Mr. Bowditch, the officers arranged the loan that they wanted with the Chemical Bank and other banks?

MR. STITT: I object to the form of this question as leading.

THE COURT: Overruled.

Q I am referring to the bridge loan.

A I know that the bridge loan was consummated. Since I haven't read this whole memorandum here, I can't get the bridge loan in context with this.

Q I don't think you need to, Mr. Lepley. I just want to know whether in fact after February 9th, instead of proceeding to arrange a $50,000,000 borrowing as it says in the first sentence with Mr. Bowditch, they arranged it with the Chemical Bank?

A I know that they arranged it with the Chemical Bank.

Q Did you know or do you know whether or not after they arranged it with the Chemical Bank, Mr. Bowditch congratulated Mr. Bevan and said he would be happy to join in?

A I have no knowledge of that.

Q Now, I'd like to show you Exhibit F-79 received this morning as Plaintiff's Exhibit F-79, your letter to Mr. Loder of December 1, 1969.

Just for clarity, will you tell us what was meant in the first sentence by, "The last piece of the final 50,000,00 was sold on November 28, 1969"?

A Yes. The commercial paper that we were authorized to issue by the ICC was authorized in, I believe, three pieces. The first piece was 100,000,000, which was done back in '68, and then we were allowed to -- then we were authorized to issue another 50, which brought it up to 150, and then we were finally authorized for another 50, to bring it up to a total of 200,000,000.

Q It is that final one that you are referring to here?

A This refers to the final 50, bringing us up to 200,000,000.

Q Is it a fact that according to your recollection, and I may say, Mr. Lepley, this is preliminary, because we have got the data in the record here for the Court's purposes, is it your recollection that Goldman, Sachs took that whole extra 50,000,000 into inventory position and proceeded to push it out in the market in the sense of selling it off?

A That's not my recollection.

Q How fast did it go out? How fast did the investors in the short-term money market accept this additional 50,000,000?

A My recollection is that it was done over a period of a few weeks.

Q Did you think that was a pretty good marketing job?

A Yes.

Q Is that the significance of your reference to your paying a little higher discounts during that period?

A Where is that?

Q At the bottom of the page and going over to the second page. You see where it says "rate" at the bottom?

A Yes, and I notice that I did say at that time, "Some of this could be due to the need to dispose of the new $50,000,000 amount superimposed on roll-over requirements."

Q Isn't it a fact, Mr. Lepley, that dealer paper usually does run about or in those days was running about one percent higher than direct issue paper, like you say, "Example, Ford Motor Credit Corporation, General Motors Acceptance Corporation"?

A I don't remember whether that was typical or not at that time.

Q You weren't that close to the rates?

A No. Not competitive rates.

MR. PIEL: That's it, Mr. Lepley. Thank you.

MR. STITT: Just a couple of questions, Mr. Lepley.

RECROSS-EXAMINATION

BY MR. STITT:

Q I am going to ask you, beginning at Page 50 of your examination before trial, if you were asked these questions and gave these answers, particularly with reference to the meeting that you had at Philadelphia following your meeting at Goldman, Sachs on December 9th:

"Question: Can you state when it was that you had your meeting with Mr. Loder, Mr. O'Herron and Mr. Shaffer in view of the meeting of December 9th?

"Answer: Shortly after the meeting, it would probably have been the latter half of December.

"Question: Can you state where that meeting occurred?

"Answer: As I remember, it was in Mr. -- it was in Jonathan O'Herron's office."

Yes, your Honor, I am skipping three questions and answers.

"Question: Do you recall to the best of your recollection, again I am not holding you to specific words, but the subject matter that was discussed by each person and the position taken by each person, can you give us that, please?

"Answer: I can't give it to you by person. The general feeling was that it would be rather difficult for us, difficult and expensive, for us to arrange 100 percent back-up lines for our commercial paper.

"Question: Can you state why it was the general feeling that it would be difficult for you to arrange 100 percent back-up lines for your commercial paper?

"Mr. Graham: I object to the form of the question.

"Answer: I said it would be difficult and expensive. It would have been difficult for us to arrange 100 percent back-up because of the bad credit market at the time. This was coming into a pretty bad credit period, and the fact that the company was very heavily borrowed from its domestic banking connections."

Did you give those answers to those questions?

A That sounds like my answers, yes.

Q With regard to --

THE COURT: Will you tell me the point of reading that, since you brought it out on cross this morning?

MR. STITT: I just wanted to bring out that this was a group meeting --

THE COURT: He admitted it from the stand on cross-examination this morning. What do you add by reading it into the record this afternoon?

MR. STITT: Simply to put the redirect examination

examination in proper perspective.

THE COURT: That's a question of argument.

Q With regard to the European dollar loans, just two questions: one, you never got them?

THE COURT: He never asked for them, is what he testified to.

Q And you don't know why the Europe dollar lines were not obtained, do you?

A I never got a response from our financial vice-president.

MR. STITT: Thank you, Mr. Lepley.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. PIEL: Mr. Wilson.

ROBERT GORDON WILSON, called as a witness on behalf of the defendants, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PIEL:

Q Are you a general partner of Goldman, Sachs?

A Yes, I am.

Q For how long?

A Since January 1, 1967.

Q What were your duties in 1969 and 1970?

A I was partner in charge of the commercial paper department.

Q Briefly, what were your responsibilities in that regard?

A All aspects of running the personnel that bought and resold the commercial paper at Goldman, Sachs.

Q Were you responsible for credit decisions?

A Yes.

Q What do we mean by credit decisions?

A When we agreed to take on a commercial paper issuer and continue to handle it, we had a credit department which reviewed the credit, and I was responsible for such decisions relating to credit, would we continue to handle it, would we take it on, at what level of outstandings, etcetera.

Q And the credit department was, although they are both called department, the credit department was actually a unit of the commercial credit department?

A Correct.

Q And reported to you?

A Correct.

Q That was Mr. Vogel who was the head of that?

A That is correct.

Q Tell us what your formal education was?

A I went to Haverford College, graduated in 1955 with my Bachelor of Arts degree, graduated from Columbia in 1957 with my M.B.A.

Q Master of Business Administration?

A Correct.

Q Did your studies at Columbia include business accounting?

A Yes, it did.

Q Did you have one of your courses for your master's degree in advanced accounting?

A Yes.

Q After you graduated from the Columbia Business School, what did you do next?

A I came to work at Goldman, Sachs.

Q You have been there ever since?

A That is correct.

Q So that was then since 1957?

A Correct.

Q Some 18 years, if my arithmetic is right?

A I believe that's correct.

Q Would you tell us very briefly what your successive jobs or appointments and duties have been at Goldman, Sachs over these 18 years?

A From the time that I started in 1957 until January 1, 1967 when I became a partner, my assignments within the commercial paper department were as a salesman, I was head of New York sales, national sales manager, then I went over on the purchasing side of commercial paper, that's working with the issuers, and then I become a partner in 1967.

Q Did you become head of the commercial paper department when they made you a partner?

A Yes.

Q Who was your predecessor?

A John Rhoades.

Q What kind of training did you receive in the commercial credit department work?

A I was trained by partners within the firm, particularly within commercial paper, Mr. Howard Sachs, Mr. Bob Anderson, Mr. Harold Wass, Mr. Jim Hemphill, Mr. John Rhoades, all partners at various times that had spent their full time within the commercial paper department.

Q This was on-the-job training?

A Yes, sir.

Q Are you married?

A Yes.

Q Do you have a family?

A Yes.

Q In 1969 and 1970 were you a member of any professional or other associations connected with your work?

A Yes.

Q What was the association?

A The Investment Association of New York.

Q Did you have any position of responsibility within that association?

A Yes. There was a capital committee that I was chairman of.

Q Do I have the right name of this, and correct me if this isn't right, was it called the Capital Money Market Committee or was it just called the Capital Committee?

A No, you are correct. Capital and Money Market Committee.

Q Capital and Money Market Committee?

A Correct.

Q Will you explain the function of that committee?

Q Our committee met once a month and wrote market letters for both the treasury, the U. S. Treasury Department, and for the Federal Reserve.

Q That is with respect to current developments in interest rates in the money market?

A Yes, a current feel in the short and long-term capital markets.

Q The principal function of the committe was to keep the United States Treasury Department and the New York Federal Reserve System aware of and in touch with these conditions?

A From our point of view, correct.

Q We will come with particularity to Penn Central, but I want to sketch, if you will, not in great detail, but so that we get a picture of it, of what the process was that you went rhough from the time you were head of this department up through the early part of 1970 for arriving at a decision that Goldman, Sachs would handle the commercial paper of a particular corporation?

A Of any issuer?

Q Yes, in general and briefly.

A Normally, one of Goldman, Sachs' corporate finance men or a partner would initiate discussions with a corporation about issuing commercial paper. When the corporation became a good prospect, usually someone from within the commercial paper department, probably at my level, or within the credit department, was asked to get involved.

We would -- "we" being either the credit department or myself -- would make a preliminary judgment, looking at whatever was in our files such as annual reports or prospectuses or Moody's manuals, etcetera, a judgment whether we thought it was something that the corporate finance man or a partner should pursue in soliciting that account.

If the initial screening was positive, there would probably be one or more meetings with the potential issuer.

Q Let me interrupt you and ask you if the initial screening was negative, what would be the procedure?

A We would so inform the corporate finance man or the partner and say that we just don't think it is the type of name that Goldman, Sachs wants to handle, and give the reason.

Q You give him the reason?

A Yes.

Q And then let him find a diplomatic way to bow out?

A Correct.

Q When it is positive, will you proceed with what you then do?

A All issuers aren't the same, so this is a general summary of how we would take on a new account. There would be a meeting with the company, there would be a -- we would ask questions, what the use of the proceeds of borrowing in the commercial paper market would be used for, we would ask for certain documentation, including borrowing resolutions, signature cards, if there were revolving credit agreements or other long-term agreements we would ask for copies of those.

We would ask questions if we had them as to their -- regarding their most recent financial statements, including footnotes. We would inquire as to what their -- as they looked ahead into the coming year, what their plans were, needs for funds, any financings in the offing, any acquisitions, this type of getting a feel for where the company was.

If we were satisfied with the information that we learned, we would then make checkings at their commercial banks, if they had lines of credit we would check those banks. We would review all the documents that had come in, and usually at this point in time, depending on how involved I was with the particular issuer, I would ask Jack Vogel, "Is everything complete, have you done your analysis or investigation, are you satisfied that this is an issuer that is credit-worthy and a name that Goldman, Sachs wants to handle and you are satisfied with everything you heard?"

At that point if the answer was yes and it was a positive report, and depending on whatever other questions I had at that juncture, we would proceed to go ahead and start to buy the paper.

Q You used the word "credit-worthiness." It has been used a lot here. I want your understanding of it as of 1969 and 1970. What is that concept?

A Credit-worthiness as used in the commercial paper market relates to the credit department and my analysis of an issuer being able to meet its commercial paper maturities and other short-term obligations as they come due.

Q Does your consideration of taking on the issuer involve any assessment of the capabilities of management as management?

A Yes.

Q What is the normal course with regard to any ongoing credit, what shall I say, monitoring or ongoing review--

A Excuse me. Are you asking me what I do?

Q No. Mr. Wilson, let's take the period 1963 when you took on this issuer through the early part of 1970. What was the normal course in the commercial paper department and/or credit department with regards to an overview of the ongoing situation of the issuer? It is a badly phrased question, but I think you know what I mean.

A There were a variety of things being done within the credit department and by me to instigate and to follow through on an ongoing review. These things included articles that appeared in the press, which might be quarterly reports or annual figures that came out or annual meeting statements by chairmen at annual meetings, and other matters that were reported in the press. They would include meetings that either I, someone in our credit department or someone else at Goldman, Sachs had with the management of the railroad when it pertained to commercial paper, I would get copies of those reports and obviously if I was there I would be asking the questions and satisfying myself on whatever the topic was.

If there was a financing of some kind during the year, we would be requesting and receiving and reviewing those documents pertaining to those financings. In the case of the Pennsylvania -- Penn Central Transportation Company, there were several ICC applications which the Commission granted. Copies of that were sent to Goldman, Sachs. It would be things like this that would keep us informed of the affairs of the railroad.

Q Mr. Wilson, do you have a speech impediment?

A Yes.

Q Is it chronic?

A I don't think it is chronic.

Q How long have you had it?

A Ever since I can remember.

Q As far as you know, was there ever a time up to March 16, 1970 -- excuse me. I have got to ask another question first.

As a matter of general practice, when a decision was made to take on a new issuer, and I am referring now to the period prior to March 16, 1970, was a written report made to record the decision and to set forth the basis for it?

A No.

Q How long has Goldman, Sachs been in the commercial paper business?

A 106 or 7 years.

Q As far as you know, was there ever a time prior to March, 1970, when written reports were made and filed to record a conclusion that an issuer was credit-worthy?

A No, I am not aware of any such reports or practice.

Q Did you have in mind at those times or did you know in those times of any reason why a report would be desirable, a formal recording of the conclusion?

A No, sir, I know of no such reason.

Q Will you please explain why?

A To me it would be just several of us -- in this particular time frame I was the final decision-maker, and I talked with Jack Vogel, I might have touched bases with a George Van Cleave or a John Rhoades or somebody else. We made a decision. To me there was no need to fill our files up with the reasons for that. We had gone through them and made the decision.

Q Does that mean that there wasn't any documentary support in your records for the credit evaluation?

MR. STITT: I object to the form of that question. We are now going from whether or not there was a formal report of the conclusion whether to take on the issuer and now my adversary is switching into a formal credit analysis.

THE COURT: Do you have any objection to his doing it?

MR. STITT: No, sir, just as long as it is clear in the witness' mind.

THE COURT: We know of the existence of Exhibit A.

MR. PIEL: I will withdraw the question.

Q Did you regard Exhibit A as containing a sufficient indication --

THE COURT: Does he know what Exhibit A is?

Q Do you know?

A I think I do, but I am not sure.

Q Show it to him.

With specific reference to Penn Central, did you regard Exhibit A as having adequate basis of information so that you could, if called upon, demonstrate what your decision was based on?

MR. STITT: I object to the form of the question.

THE COURT: Overruled.

A A good portion of it was in here.

Q Was there more?

A My own evaluation of the management of the railroad I don't think appears in this, no.

Q Was there also in the files of the credit department usual standard financial manuals, the Moody's series and the like? Is that information part of the basis?

A In some of our files there are xerox copies of certain pages that come from the manuals. In the case of NCO, their reports would be in here. A further example of items not in this Exhibit A would be the files within the credit department that contain the documents, such as revolving credit agreements and copies of long-term loan agreements, and so on, and the documents pertaining to the authorization by the board of directors to issue.

But from a -- basically from a credit point of view, the working things we needed and to keep current with were in this file, with those exceptions that I have just mentioned.

Q Who made the decision on behalf of Goldman, Sachs that Goldman, Sachs would act as the dealer for offering Penn Central's commercial paper?

A I did.

Q Can you fix a time?

A Just prior to when we began offering, which I believe was August 1, 1968. It would have been a few days just before that.

Q That's when you arrived at a conclusion?

A That's correct.

Q How long had you had it under consideration?

A Had I had it under consideration?

Q Yes.

A I believe we were first asked -- I would like to start over. I believe we got the first indication that the merged railroad would want to issue in late 1967. Peter Fisher learned that information.

Q From someone in Pennsylvania Railroad?

A Yes, when he was down seeing one of the officers of the railroad. Then there was a luncheon --

Q I am not asking you about that. You fixed the time of the beginning of your consideration. Did the information considered by you in reaching your conclusion include information previously obtained with regard to the two predecessor railroads?

A Yes.

Q In the days when you were selling commercial paper, did you personally call on officers of the New York Central in that connection?

A Yes, I did.

Q Did you become acquainted with the New York Central's financial officers personally?

MR. STITT: May we fix a time, please?

A I believe that was in the late 1950's or early 1960's.

Q Did you become acquainted with the financial officers?

A Yes.

Q Did there come a time when you also discussed with the New York Central's officers the matter of that company issuing its own commercial paper?

A Yes.

Q When was that?

A I believe in the fall of 1967.

Wilson-direct

Q Did Goldman, Sachs thereafter act as a dealer for marketing commercial paper of New York Central?

A Yes, we did.

Q Did you in that connection get to know financial officers of the New York Central?

A Yes, I did.

Q Who were the New York Central financial people you came to know?

A Mr. Walter Grant and Mr. Ray McCrone.

Q Did Mr. McCrone afterwards to to the merged road?

A For a brief period of time, yes.

Q Did you handle commercial paper for any other railroad enterprise as an issuer?

A Could I have a time frame?

Q Prior to taking on the Penn Central.

A Yes.

Q What was that?

A The Chessie Corporation, wholly-owned by the Chesapeake & Ohio Railway. Also back in the mid 50's I believe we handled the paper for the Santa Fe.

MR. PIEL: I am going to, if your Honor please, question Mr. Wilson about matters reflected in the blue sheets in the credit file. Some of those blue sheets have been placed in evidence by plaintiff and all of them have been placed in evidence by us through the Exhibit A. But I am going to confine my questioning to a time span from September, 1969 up to the last blue sheet prior to March 16th which was dated March 5th, and I thought it might be a convenience for the Court just to have a set of the blue sheets which we have reproduced from the credit file so they are in chronological order.

THE COURT: That's marked as Defendants' Exhibit A-1 for identification.

MR. STITT: I believe, your Honor, we already have a document which was designated A-1 as a defendants' exhibit in the pretrial order.

THE COURT: I don't care what it was called in the pretrial order, it is what is offered here. Has it been offered here?

MR. PIEL: As such, I dont think so, your Honor. We offered Exhibit A entirely.

THE COURT: Sorry. There is a Defendants' Exhibit A-1, Trend Analysis of Comparative Annual Reports.

MR. PIEL: That means it is the first numbered item in Exhibit A. May I suggest, your Honor, we just mark this Exhibit AAA for identification and get out of the system?

THE COURT: All right.

(Defendants' Exhibit AAA was marked for identification.)

Q After the merger, did you meet with the financial officers of the merged road to discuss the issuance of commercial paper?

A Yes.

Q With whom did you meet?

A Mr. Dave Bevan and I believe I had phone calls, phone discussions -- that's not -- I can not remember whether I met with or phoned several of the other officers.

Q At that time was Mr. Bevan's reputation in the financial and business community known to you?

A Yes.

Q What was it?

A It was an outstanding one.

Q There is a term that appears in some of the blue sheets that's called the "we-needs." In order to explain that reference where it occurs, will you explain what it means?

A Yes, the phrase "we needs" is Goldman, Sachs' terminology within our credit department for the list of information the credit department has not already received but needs to bring our credit file up to date and to complete whatever studies or analysis they are doing, prior to taking on the issuer.

Q I am going to refer to two blue sheets that preced what your Honor has here, or two reports, blue sheet reports that are in the credit file but they precede the date that I have given your Honor in Exhibit AAA for identification.

Will you find in the credit file before you, sir, blue sheets by William J. Kealy under date of May 13, 1968, Exhibit A-11, and June 11, 1968, A-109.

A Yes. I have found that.

Q They precede the date when you finally made the decision to take on Penn Central as an issuer?

A Correct.

Q Who is William Kealy?

A Mr. Kealy was the anlyst, the security analyst, at Goldman, Sachs. He was in our research department at Goldman, Sachs and his assignments were the railroad -- one of his assignments was the railroads, and that's who he was.

Q Was it thepurpose of the research department to develop information in appraisal of corporations and their outstanding securities other than commercial paper?

A Primarily stocks and bonds, correct.

Q Did you see and consider those memoranda at about the time they were written or thereafter?

A Yes.

Q Did they enter into your consideration of the credit-worthiness of the railroad?

A Yes.

Q In what way?

A These two reports by Mr. Kealy, particularly the second one where he had a chance to talk with Dave Bevan about the acquisition program of the railroad and where Dave Bevan felt he was going to obtain the money to continue it, and particularly the comments that Dave Bevan made as to the earning power of this merged railroad down the road, down three, five, eight years from now, after certain economies were accomplished, this was, I would say if I had to pick the important things out of that blue sheet and that report by Mr. Kealy, these were the key things it meant to me.

If I may summarize it again, it was the two railroads being put together, certain economies had to be achieved, the chief financial officer was discussing them at some length with our security analyst as to what this would mean in terms of earnings per share in the next few years.

Q To go aside from that for a moment, during 1969 and 1970, what were your practices with regard to reading the financial press?

A I read then and read now the Wall Street Journal and the New York Times every day. Those days when I am traveling or can't get them, we have a clipping service within Goldman, Sachs which I am on, and I get copies of certain articles, ones that relate to Goldman, Sachs' clients.

Q If you come back from a business trip, you catch up?

A That is correct.

Q In your daily reading -- do you read during your vacations?

A I try not to, if you are talking about the Wall Street Journal.

Q Yes.

A I try not to.

Q That's a catch-up reading when you get back?

A Yes.

Q Do you look for items concerning companies whose commercial paper you are handling?

A Yes.

Q They are in evidence now through Exhibit A and also some other exhibit numbers. I am not going to ask you to look at some particular ones in an attempt to move along here, but did you read the press reports in the period 1968 to early 1970, some of which are in evidence, about operating losses of Penn Central Transportation Corporation?

A I can't tell you that I read every quarterly release that came out, but I certainly remember reading quite a few of them.

Q Were you aware in one way or another through the clipping file or your own reading of at least quarterly financial results, financial operating results?

A Yes.

Q Do you recall reading in the press during that period articles that indicated a trend of declining earnings of the Penn Central System on a consolidated basis?

A Yes.

Q In the face of reading both about operating losses in the so-called parent Penn Central Transportation Company and a declining trend of earnings of the consolidated system, did you consider it prudent to be offering the commercial paper notes of Penn Central to short-term money market investors?

A Yes.

Q Will you explain to the Court, please, why that was your view in the face of that kind of ongoing public news about the enterprise?

A And the time span is --

Q With particular reference to -- cover what span you need to explain your views about it, but we have particular reference here to the end of '69 and the beginning of '70 up to March 16th.

A My expectation had been from the time that the two railroads were merged together that there would be a period of several years where the two railroads merged would still be operating in the red. The only reason the ICC in my opinion allowed these two railroads to merge was because they were -- separately their railroads operations were each in the red and by putting them together after years of study they felt there were certain economies to be achieved, that this could be a turn-around and the merged railroad would be in the black.

The Kealy memorandums which we have just referred to reinforce these expectations from the senior management of the Penn Central, and I was aware of these.

So my expectation during '68, '69, into '70, was to see losses in the railroad operations. I was well aware that the railroad operations, though operating in the red, had been offset by income coming from the non-railroad subsidiaries, and this in fact was true right through the end of 1967 where they reported a $4,000,000 consolidated profit. The decline was down, but the expectations were there that the operations of the railroad would be in the red, the consolidated profits would be in the black.

This was a period in my mind where we were going to watch and see the progress that was made in putting these two railroads together. In my own mind, from an overall view as head of the commercial paper department at Goldman, Sachs, I felt that there was ample leeway in terms of earnings and assets in this family of companies to give this cushion, if you will, to the decline in consolidated earnings that was going on. It had not reached the point where I said, "Wait a minute, let's get the railroad people in here, I want to see exactly where this thing is going to be in the next six months to a year, things have gotten so bad that we are going to stop selling paper."

It never occurred to me that there was anywhere near this level or near this cushion of assets and earings available.

Q It is in the documentary evidence that there was this reorganization as of October 1, 1969 of the railroad when the railroad so-called parent company which had been called the Penn Central Company changed its name to Penn Central Transportation Company and they created a new holding company which was given the old name and which held as its only asset all of the stock of Penn Central Transportation, which continued, the same corporation, to issue notes through Goldman, Sachs, is that right?

A Right.

MR. STITT: I object to the form of that question as leading.

THE COURT: Overruled.

MR. PIEL: It is preliminary, calls attention to a statcof facts that is in the evidence.

Q What was the purpose of that reorganization, as you understood it?

A To permit the railroad management to more easily make acquisitions.

Q How would the acquisitions be made?

A By having a holding company set up, they would be able to use as currency for acquisitions the stock in the holding company.

Q And acquire other companies by an exchange of stock with the shareholders of the company acquired?

A Excuse me. That's what I meant by the currency for acquiring the other companies, would be through the stock of the holding company, correct.

Q If those companies were not engaged in railroad operations, they would be subject to the SEC instead of the ICC?

A I don't know that point.

Q Three companies were acquired by the holding company, and I ask you, as of April 1, 1970, in other words, prior to that time, if they had acquired Southwestern Oil &

Refining Company, Royal Petroleum Corp. and something called Penn Central International, were those all acquired by exchange of stock?

A I don't know.

Q If you will look at the blue sheets in front of you, please, in Exhibit A, and turn to the blue sheet for September 19, 1969, so dated -- you will find that, your Honor, in AAA for identification -- we have had previous testimony that although the blue sheet by Jack Vogel was dated September 19, 1969, that should be September 11, 1969.

In any event, the meeting referred to took place on that date according to previous testimony. It refers to you as being present there. Do you see that blue sheet?

A Yes.

Q Apart from what it says in the blue sheet, do you have an independent recollection of what went on on that occasion?

A I have read these blue sheets frequently in preparation for this trial, and I can't honestly tell you I have an independent recollection.

Q Will you look through this one, if you have read it before, and more than once, you won't have to read it all now, if you will look it over you will recall the contents of what you read of it.

What I want to know is if you recall anything having to do with discussions at that meeting beyond what is in this blue sheet?

MR. STITT: If your Honor please, I believe the witness just answered the question that he does not.

THE COURT: He is being asked to look at it again.

A I do not.

Q There is a reference in the second sentence that the purpose of the visit from Mr. O'Herron was to outline Penn Central's short-term borrowing needs in the near future and to discuss increasing commercial paper to 200,000,000 from the then current 150,000,000 level.

Was such an application made?.

A To the ICC?

Q Yes.

A Yes.

MR. PIEL: I am going to have to back-track and apologize to the Court for losing my place.

Q I'd like to show you Plaintiff's Exhibit F-49 in evidence, which is not in the blue sheets. This is the previous increase from 100,000,000 to 150,000,000. Is this a letter, this Exhibit F-49 dated March 11, 1969, which you wrote to Mr. Bevan?

A Yes, it is.

Q Had Mr. Bevan asked you for this expression of opinion?

A Yes, I believe he did.

Q Before you wrote that letter to Mr. Bevan, did you do anything to arrive at the conclusions that appear to be expressed in particuarly the first three paragraphs?

A I can't tell you what specifically I did, no.

Q Have you on other occasions been asked to express opinions about marketability of paper?

A Yes.

Q If you can't remember specifically what you did in this instance, would you tell us what your practice was?

MR. STITT: I object to the form of that question. If he can't remember on this occasion, your Honor, I don't know how it helps to ask about his practice with regard to other situations. We are dealing with the ICC and railroads. I don't know if it has been established that he has given --

THE COURT: What do you mean, dealing with the ICC?

MR. STITT: I believe the testimony has been that this letter was going to be used -- not by this witness here today but previous testimony, this letter was going to be used by Penn Central in connection with an application to the ICC in or about thistime, in the forepart of 1969.

THE COURT: Objection overruled.

A What I would have done when asked a question about the capacity of the commercial paper market to handle a certain level of outstandings would be to talk to people, such as George Van Cleave or Roger Lynch or Matt Tolan, who was head of national sales, and get their view of how the issuer's notes had been received in the market and what reception it was getting. That would help form my judgment.

On something the size of this, I probably would have talked to John Rhoades or Jim Hemphill.

Q John Rhoades was your predecessor?

A Right.

Q How long had he been head of the credit, commercial credit department?

A I would say six or seven years.

Q And Mr. Hemphill, who was he?

A He was and is a partner in our Chicago office. He is in his 70's and he spent his whole career in commercial paper, having come from Hathaway & Company, and someone whom I talk with quite frequently in being head of the commercial paper department. It is kind of a sounding board for me.

Q What was Hathaway & Company?

A A small regional commercial paper firm.

Q In Chicago?

A I believe so, either there or St. Louis, I am not sure.

Q Was it in fact your opinion at that time that the $150,000,000 commercial paper program for Penn Central was sound?

A Yes.

Q Did the ICC -- we know the ICC granted this application. At that time or at any time did you inquire of the financial officers of the Penn Central as to what they were going to do with the money raised by issuing commercial paper?

A At the time of this letter?

Q Yes.

A No, I don't believe so.

Q Did you at any time?

A I do not recall a specific instance where I asked that question of one of the officers.

Q Did you have some understanding of your own from whatever source derived, as to what they were going to do with it?

MR. STITT: I object to the form of that question.

THE COURT: Overruled.

A Yes. I had felt that the proceeds from paper were going to be used for working capital purposes until they turned the railroad operations around.

Q Has Goldman, Sachs issued commercial paper and acted as the dealer for the issuance of commercial paper by public utility companies?

A Yes.

Q And does at the present time?

A Yes.

Q Had it done so before 1969 or 1970?

A Yes.

Q For how many public utility companies?

A I would say ten to fifteen.

Q Do you know when public utility companies first issued commercial paper notes?

A Yes.

Q When?

A Either in late 1963 or early 1964.

Q Through what commercial paper dealer did public utility companies first issue commercial paper?

A Through Goldman, Sachs.

Q Were you involved in that?

A Yes, I was.

Q Tell us about your involvement and how it came about that you started handling commercial paper for public utilities.

A Several utilities in 1963 had asked me whether it would be possible for them to access the commercial paper market. It was not uncommon for these utilities to have a negative working capital or maybe a slight positive working capital.

Since there was no clear seasonal swing in their year activity, such as a department sore or a tobacco company, we -- "we" being myself and John Rhoades -- devised a formula which, simply stated, was that a utility should be able to sell commercial paper in a dollar amount equal to the dollar amount of its receivables arising out of the sale of gas, electricity, phone service or water service. We took this formula to the SEC --

Q Why did you take it to the SEC?

A Because I didn't feel that an issuer clearly had a right of exemption under the 1933 Act, Section 3(A)3, that the approach was to get our counsel and to go down there and to ask for a no action letter. So we were going down on behalf --

Q So that it would qualify as commercial paper that didn't have to be registered before it was offered?

A That is correct. So on behalf of utilities in general, we went down with this formula and discussed it with them. We had a preliminary discussion. They thought the formula made sense, so we came back and submitted a formal request for a no action letter, and this became the first formula that was used to permit utilities to sell commercial paper under the '33 Act.

Q Were subsequent and different formulas approved by the SEC for the issuance of commercial paper by corporations not engaged in some seasonal activities?

A Yes.

Q What were the further tests that were approved by no action letters?

A Leasing companies, REIT's, bank holding companies--

Q Wait a minute. REIT's, real estate investment trusts?

A Correct. Bank holding companies. These are the ones that come to mind.

Q Finance companies keep paper out all the time?

A Yes.

Q Not keep it out on a seasonal basis, but for working capital?

A Well, a finance company, I don't consider a working capital concept for a finance company. I have trouble with the question.

Q Then I withdraw that question and go back to these other companies that you are talking about.

In all of those instances there was a formula to permit them to issue commercial paper exempt from registration, the proceeds of which would be used for working capital purposes?

A Or other purposes stated in the no action letter. A bank holding company, REIT, does not have working capital purposes. It would be for the purposes stated in the no action letter.

Q Do you recall if the formula was enlarged at any time?

A Yes. You are talking about the utility formula?

Q Yes.

A Yes.

Q How?

A There were three or four other no action letters relating to utilities. One added the previous year's depreciation to our formula.

Another no action letter for utilities went to the income statement and said that one-quarter of the previous twelve months revenues could be the dollar amount of paper outstanding.

Q Was that called a formula to meet the current transaction test?

A Yes.

Q Based on the concept that you can't trace dollars, and as long as they are spending that much on transactions, it is all right?

A That is correct.

Q With regard to the Penn Central Companies or the Penn Central Transportation Company as the name later was, it was basically exempt from registration for commercial paper because of another section of the '33 Act?

A Correct.

Q And that's Section 3(A)6?

A 3(A)6.

Q Which exempts corporations subject to the jurisdiction of the ICC. I ask you with respect to the formula approved by the ICC for your handling of the commercial paper of public utility companies whether the financial and operating facts about the Penn Central fit that formula.

A Yes, they did.

Q It was the receivables, to begin with, the receivables at all times while the paper was outstanding, according to the financial statements that you saw in excess of the amount of outstanding paper?

MR. STITT: May we fix the time, please?

MR. PIEL: I am saying at all times, prior to March 16, 1970.

A My recollection is annual reports, audited annual reports, that that statement is correct that the receivables were somewheres between 220,000,000 or 240 millions of dollars for '68, which would be the -- 1968 and 1969.

Q Let alone any allowance for depreciation, or anything else?

A Right. I can't tell you that they were at all times in between quarters or on each quarterly date, but at the annual report time, that is correct.

Q I think you said ICC formula. Did you mean SEC?

A I misspoke if I said ICC.

Q You meant?

A SEC.

Q Then the time cane when there was this further application to the ICC for a further increase of authorized outstandings of commercial paper, and so I am back to what I jumped to by mistake before, which is the blue sheet relating to the meeting on September 11, 1969, which is misdated September 19, 1969. There is a reference in the second sentence to the purpose of Mr. O'Herron's visit being to discuss this further increase.

Was it your judgment at that time that this increase was an increase which was marketable in the first place?

A May I read through this?

Q Yes.

(Pause.)

Q This proposed increase, I should say. It is proposed at this time.

A I don't see in here where I -- it says that John had gone ahead and applied to the ICC, John O'Herron had gone ahead and applied to the ICC. He is expecting approval shortly.

Q In connection with that application, do you recall whether he or Mr. Bevan or anyone else in behalf of Penn Central discussed with you the ability of Goldman, Sachs to market an increase or the capacity of the short-term money market to absorb that?

A Yes, I believe he did, and I can't tell you when, but I believe he did, and I was affirmative on it.

Q It was your judgment at the time that the market could absorb it and Goldman, Sachs could handle it?

A Yes.

Q Did you have an opinion at that time as to whether or not it was prudent from the point of view of credit-worthiness?

A Yes.

Q What was that opinion?

A That opinion was based on several factors. One, clearly they had to get ICC approval, and that in itself was -- they had to file all their reports and documents with the ICC, and I thought it important that they receive that authorization.

Secondly, I felt that there were ample assets within the family of companies, within this Penn Central family of companies, to bring to bear, if there ever needed to be, to certainly cover an increase of 150,000,000 to 200,000,000.

Q Where did you get that understanding?

A It was my general understanding as I made the decision to take the railroad on and my reviewing of it, ongoing review that I made from press articles, any discussions that I had with the railroad, and --

Q Were you touching bases with Vogel on this?

A Yes, and that was going to be my last point, that I would talk with Jack about the railroad from time to time, and in those discussions would come forth his concurrence with my view.

Q At the bottom of the blue sheet that we are looking at, and this is one by Jack Vogel, but you are marked for a copy, do you recall reading it at the time?

A I don't know whether I read it on the exact date, but in the approximate time, yes.

Q Because you read the blue sheets that had your name on them?

A That is correct.

Q And Mr. O'Herron was pointing out to you that the company would be in a very tight cash position in the first quarter of 1970 -- "to you," I mean Goldman, Sachs, Mr. Vogel -- and asked if Goldman, Sachs could put out as much paper as possible in April or longer, does that mean maturing in April or later?

A Yes. It means that if we could find a segment of the market that wanted to buy with maturities of April or longer, they would like to have as many of those as possible.

Q So that that would mature in a time after the cash pinch?

A Correct.

Q Did this reference to a tight cash position in the first quarter of 1970 give you pause with regard to the credit-worthiness of Penn Central?

A No, sir.

Q Why not?

A For several reasons. One, the first quarter of each calendar year for both the Central and -- the New York Central and the Pennsylvania Company and the merged company has historically been one of poor earnings and a tighter cash position. Snow storms, it is the unforeseen things, the slowing down of traffic because of those that plays havoc with their cash flow. This is something I had known. Secondly, the concept of being in a tight cash position did not mean to me that they were running out of cash. Those were the reasons.

Q Now if you turn the page to October 3, 1969, it is another Vogel blue sheet addressed to you and others, and it refers to remarks of Mr. Bowditch, vice-president in the transportation division of the First National City Bank, with regard to Penn Central, referring to a rumor he heard of problems in marketing the notes and suggesting an increase in the revolving credit from the banks to assist that operation and making other expressions of his opinion about the Penn Central, including that it was a unique credit with substantial asset values.

Did you know who Mr. Bowditch was?

A I knew -- I didn't know the man, I knew he was with First National City Bank and one of the senior loan officers, but I never met him.

Q Were you influenced in your views and opinions about credit-worthiness by the opinions you heard expressed through bank checking and otherwise of commercial bankers?

A Could I have that question? I don't have that in mind.

(Record read.)

A Influenced only to the extent that they confirmed the judgment that we had formed and I had formed. To that sense they had an influence on me. Secondly, if we had been told by an issuer or the railroad that they had a certain amount of a line from a particular bank and we made a checking and it wasn't there and it didn't exist, that wouldhave an influence on me.

Q That would be a negative influence?

A That would have a negative influence. Also, if we had found either from the company or bank checkings that lines had shrunk for some reason and we made bank checkings and found out those reasons, that would have an influence on me.

Q The October 15th blue sheet notes the ICC approval was received.

Going on into the month of November, there is a blue sheet by you on November 10, 1969. Again, doyou have an independent recollection of this or is your recollection wrapped up in the blue sheet?

A I have just scanned it, and I see the one that you are talking about, and it is where I was telling John

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that there had been this adverse publicity by their counsel, Mr. Cox, and that I thought it would be good for them to get more lines, additional lines.

Q What is the relationship between additional lines and bad publicity?

Does the bad publicity affect the credit-worthiness of the railroad, in your estimation, to begin with?

A It depends what kind of publicity. It might.

Q Did this publicity about the Penn Central affect your estimation of the credit-worthiness of the road?

A No.

Q Then for what reason or for what purpose did you on account of the bad publicity advise him that they may want to be thinking about getting another $50,000,000 of standby lines?

A Because this went to Goldman, Sachs' capacity to market paper, and I felt that investors might say that if there is adverse publicity in the papers and talk about the railroad, trouble with the merger, that some investors might say, "Let's not buy that name right now," and there could be a run-off.

In order to facilitate our maintaining the $200,000,000 level, the importance of having more standby lines and swing lines, both of which I had been after them since September to get, and I was re-enforcing it here and tying it in to this article, would be helpful to meet that objective.

Q The presence of bank lines are helpful then in dealing with diminution of investor interest?

A Yes.

Q Are some investors interested in whether there are standby lines or not?

A I don't think they care whether there is -- some investors -- I am confusing swing lines and standby lines, excuse me.

I thought I was asked about swing lines.

Q No. Let's talk about standby lines.

A Or standby lines, some investors have a requirement that they can only buy commercial paper of issuers that have a certain percentage of standby lines or back-up lines, unused bank credit to cover the paper, some percentage, yes.

Q What is your understanding of the reason for that being a criterion with some investors?

A My understanding of this is that a group of non-bank investors, which is most of our market right now, a group of these non-bank investors do not do their own in-depth analysis of the names they buy, and that in lieu of doing that analysis, they use arbitrary tests. As long as the issuer meets those arbitrary tests, it is okay for them to buy. By this I mean such arbitrary tests as, does it have a Moody's or a Standard & Poor's rating, commercial paper rating, does it have a certain level of bond rating, does it have 100 percent line coverage? These are kind of arbitrary tests in lieu of in-depth analysis, and reach their own conclusion about credit-worthiness.

Q When there are investors who have a criterion, if they want to know, the arbitrary tests has to be 100 percent line coverage, no matter what the issuer is, how do you, Goldman, Sachs, know that that is a requirement of that investor?

A The appropriate person at Goldman, Sachs, in this case the salesman, just learns this from handling the account. If he brought the account in, he would learn it from the time he brought it in. If he was assigned the account from somebody else, it is the type of questions he would ask from the previous salesman. He just knows it from the day-to-day handling of the account.

Q Are you telling us that the salesman at Goldman, Sachs in the normal course of their handling these accounts learn the particular requirements of particular investors with regard to arbitrary standards?

A Yes. I did when I was selling, and that's my understanding of how the salesmen operate today.

Q Also in 1969 and 1970?

A Yes, that was the practice, yes.

Q With regard to the particular unfavorable news that poor publicity in this -- referred to in the November 10, 1969 blue sheet, do you know whether Mr. Cox was inside counsel or was he outside counsel retained by the railroad?

I don't mean do you know it from this. Do you have any independent knowledge?

A I can't be -- I am not sure when I learned it, just which counsel he was. I don't know whether I knew it at this time around November 10th or shortly thereafter or when.

Q What did you learn at some time?

A That he was outside counsel.

Q Do you know if it was Mr. Hugh Cox of Covington & Burling?

A I believe it was.

Q What was he retained to do by the Penn Central, if you know?

A At this time in November, 1969, at hearings before the ICC, Mr. Cox was at those hearings representing the Penn Central, and Mr. Cox was arguing against the merger of the Baltimore & Ohio and the Chesapeake & Ohio merger.

Q Penn Central didn't want to see that merger take place, is that your understanding?

A That was their position.

Q Did you consider that the statement of this counsel in those proceedings that the Penn Central was having a very rought time with the merger was a cause for doubting the credit-worthiness of the Penn Central?

MR. STITT: May we fix a time?

Q In or about November, 1969, when you saw this news.

A I did not.

Q Why not?

A For the same reasons that I had previously stated at an earlier blue sheet here in September, and there was one other further bit of information that I had had, prior to this November 10th date, and it appears in the last sentence or so of this October 22nd blue sheet in this file where John O'Herron told me that they expected to show a small loss in the third quarter but anticipated the fourth quarter will be in the black, that's in quotes, in the black, with a good improvement. So I had that information prior to this November 10th date.

Q Mr. Cox had a point to make for the Penn Central and was trying to make it powerfully, is that right?

MR. STITT: Objection to the form of the question.

THE COURT: Sustained.

MR. PIEL: I withdraw it.

Q If you turn the pages, there is a set of bank clippings extending in date from June through December, 1969, that are collected there for the file.

Then we come to some more blue sheets and there is one of February 5, 1970, signed by Jack A. Vogel, and you are --

THE COURT: What number?

MR. PIEL: Plaintiff's Exhibit P-1 as well as being part of Exhibit A.

Q There is a reference to a report by Mr. Vogel of a telephone conversation he has had with Alan Rogers of ICC. Is Alan Rogers alive?

A No.

Q Do you know when he died?

A Two or three years ago, I believe, maybe three or four years ago.

Q Who was he?

A Alan Rogers was the senior commercial paper analyst at the National Credit Office in this period of 1969-70 and for many years prior to that.

Q Did you know him?

A Yes.

Q How long had you known him?

A I would say for four, five years, as of this time.

Q Four or five years prior to February, 1970?

A Correct.

Q Had you had conversations with him on occasions?

A Yes.

Q How frequently?

A Infrequently.

Q About what?

A Credit matters relating to our issuers.

Q Did he call you or did you call him on these occasions?

A I can't remember calling him, so I would think all of them would be occasions where he called me.

Q What was he calling you for?

A To ask about matters relating to one or more of our issuers.

Q What kind of matters?

A Credit matters.

Q Did you get from those experiences an understanding of how he went about his job?

THE COURT: I hope he didn't go about his job the way it is reflected in this note. The witness says he relied on reports in this file from the NCO and the NCO says they rely on what the witness told them. It doesn't make much sense, does it?

I think you ought to go on to something else. This is a very weak situation here as far as Roger's rating. I said yesterday in reading the memorandums I am convinced that Rogers said, "I am going to continue you because you, Goldman, Sachs, will sell the paper." That's an awful way to rate a concern, isn't it?

MR. PIEL: Yes, your Honor.

THE COURT: Let's go on to something else. Let's not waste our time on this one.

MR. PIEL: Your Honor has drawn a conclusive presumption that I think could be affected by some information about Mr. Alan Rogers and the way he did his job.

THE COURT: All I had before me for seven days now is this memorandum and another one in which Mr. Vogel tells the Penn Central people how he convinced Mr. Rogers to continue Penn Central as a prime risk because of what he told them in this memorandum. I think we ought to go on to something else. These leave me cold.

MR. PIEL: I was going to try to warm you up, your Honor, by asking him some more questions.

THE COURT: I don't think you can, especially since this witness tells me that he was relying on what Rogers put out and the NCO. It is lifting yourself by your own boot straps, isn't it?

I think there must be more to this case than this document. Let's go on to something else. I admit it is getting to 4:30, it has been a long day, but I thought I indicated yesterday my evaluation of this proof, and I still feel the same way about it, especially since this witness said he relied on what the NCO told him. The NCO said, "We rely on what you tell us."

Maybe we better adjourn for tomorrow. I don't have much regard for the NCO from what I have learned in this trial, Mr. Piel, but that doesn't really go to the merits of this suit, does it?

MR. PIEL: I will respectfully submit an offer of proof in the morning and go on to something else.

(Court adjourned.)

FRANKLIN SAVINGS BANK OF NEW YORK
-against-
GUSTAVE L. LEVY, et al.

June 11, 1975,
10 A.M.

--

ROBERT WILSON, resumed.

MR. PIEL: If your Honor please, may I begin with a correction? Yesterday I was examining Mr. Wilson about about Exhibit F49, Wilson's letter to Mr. Bevan. I said that it was not in the credit file, and I was mistaken. It is in the credit file. It is subnumbered A217.

DIRECT EXAMINATION CONTINUED

BY MR. PIEL:

Q On or after February 5, 1970, did you issue any instructions that salesmen should advise investors that it had been reported to you that Alan Rogers had said that so long as Goldman, Sachs was continuing to offer the notes he would continue the prime rating?

A No.

Q Why didn't you consider it advisable to do that?

MR. STITT: Objection to the form of the question. Calling for a conclusion.

THE COURT: Overruled. I think it is immaterial. I don't know. Maybe I didn't get my idea across yesterday.

Aside from the proof that this or these issues of commercial paper were prime rated by the NCO which would satisfy the legal requirements insofar as plaintiff was concerned in purchasing, I don't see any other issue on which this has any bearing.

MR. PIEL: The only issue that it has a bearing on, your Honor, really, is the challenge to the good faith and care of Goldman, Sachs. In other words, as plaintiff would construe it, this meant that NCO was relying only on the fact that Goldman, Sachs was selling the paper in order to rate it prime and that Goldman, Sachs knowing that --

THE COURT: First of all, it really would not make any difference because Bock, to protect himself, only had to have it prime rated by NCO. If NCRO is incompetent, or something, that's their business and it is not Goldman, Sachs business. All Goldman, Sachs has to tell a prospective purchaser is that it is prime rated. There is no charge of a conspiracy between Goldman, Sachs and NCO to prime rate this. As I say, I do not see any issue in this case on which this bears at all. I have said it three times. I don't know how many more times I can say it. Bock is the president of the bank, he gets protected when he notes the NCO has prime rated it. Nobody can attack him at that point for having bought it. You did't in any -- at least Goldman, Sachs didn't in a conspiratorial way influence NCO to prime rate it when it shouldn't have been prime rated.

If NCO is less than top drawer in making its rating, that is their problem. It is not my problem and it is not this case's problem. If NCO happens to say to Goldman, Sachs "If you are going to continue to sell it, we are going to prime rate it," that is NCO's problem, and I can't make it any clearer than that.

MR. PIEL: I was only offering it on the challenge to Goldman, Sachs good faith in going about its business, to make it clear that this plaintiff didn't believe that he was influencing the -- that Goldman, Sachs was influencing the man.

THE COURT: That Bock didn't believe --

MR. PIEL: No, that Wilson didn't believe.

THE COURT: So what? I think Vogel -- is that his name?

MR. PIEL: Yes, your Honor.

THE COURT: Very frankly was puffing his own canoe, making himself a big shot, either for his own ego or to impress the client, Goldman, Sachs has tremendous influence. Thats as far as I would go with that, period.

MR. PIEL: I will go to the next topic.

BY MR. PIEL:

Q That is your blue sheet of February 5, 1970, Mr. Wilson, in Exhibit A. You start out in this blue sheet by noting that Penn Central Transporation Company that morning, it was reported in the press, had an operating loss of $56,000,000 for the year 1969. You then said that the night before --

THE COURT: I'm sorry, Mr. Piel, I have just picked up my booklet that you gave me. What's that date again?

MR. PIEL: February 5, 1970, your Honor.

THE COURT: A71?

MR. STITT: F2, your Honor.

Q if the news came out in the press in the morning, how did you have it the night before to talk to Mr. Levy and Mr. Hemphill about it?

A There came across the Dow-Jones tape very late the evening before, it was I believe after 5 o'clock, the news that was in the paper the next morning, but the Dow-Jones tape was very garbled and it wasn't clear just what the write-off was or what the loss was. It was very garbled.

Q You thereupon called Mr. Levy who was in St. Louis and also Mr. Hemphill in Chicago?

A I called Mr. Levy that evening and I called Mr. Hemphill, as in rereading the blue sheets, I called Mr. Hemphill the next morning.

Q Why did you call Mr. Hemphill?

A Well, as I have indicated, he was a consultant to the department, I was the only partner in charge of the department, there were no other partners in the commercial paper area, and I was a relatively new partner in it. I was using Jim Hemphill really as a sounding board for it, for large accounts, ideas and a game plan of how to handle the next set of phone calls I would make and what I would do to learn more about this.

Q You then called Mr. O'Herron?

A Yes.

Q Who explained the write-off to you?

A Yes.

Q You asked him what the cash picture looked like for the first six months and he said it was very tight. Was that new news to you?

A No.

Q You have already talked about a previous statement about tight cash position.

MR. STITT: I believe the previous testimony an exhibit referred to a very tight cash position stated by Mr. O'Herron for the first quarter of 1970, your Honor. That would be the sheet for September, 1969. This seemed to expand it to the whole six months.

Q Yes, did that have significance to you, Mr. Wi. on?

A No.

Q In terms of an indiciation of questionable credit worthiness?

A No.

Q Why not?

A For the same reasons that I have indicated previously when you have asked me did a specific piece of information change my judgment or my conclusion. Here we were in the first part of 1970, there were tremendous snow storms in the northeast, and we knew that the railroads had big freight car delays, and so on. I was expecting -- I mean, the difference in my mind between tight and very tight is a very marginal thing, and, as I have testified earlier, it certainly had no connotation in my mind of a concept of a running out of cash. It just meant that the cash balances to workwith were down and were going to be slim.

Q Further down there is a reference to your having said "When I said our procedures in the future would probably be set up so we handle their paper only on a tap issue basis, where Goldman, Sachs did not inventory their notes, he said this was something he would have to refer to Dave Bevan."

MR. STITT: Will you read the rest of the sentence, please?

Wilson-direct

Q "To Dave Bevan, chairman of the finance committee and "he and Gustave Levy can talk about that.'".

If you recall anything in addition to what is stated here, did you explain to O'Herron why you were making this statement?

A I can tell you why I made that statement to him, but I don't see it in the blue sheet and I don't remember the specific words, but I can tell you the intent of my telling him that.

Q Will you tell us that?

A Yes. I was anticipating that this news that was in the press was going to bring about a run-off in the outstandings of the Penn Central paper from two hundred million down either to one hundred fifty or less, and I had been -- myself and through Jack Vogel and George Van Cleave for some months now had been suggesting that they set up bank lines, additional bank lines, on top of the one hundred million of unused bank lines so that they would have closer to if not 100 per cent bank line coverage. In my mind I thought we were going to see a run-off. I happened to be wrong in this instance. It didn't. The paper sold well. But I was anticipating this, and I had not been very successful in getting John O'Herron to set up these additional standby lines. So I was deciding to get a little tough with them in negotiating with them, and one way to do that in my mind is to say is there is going to be a run-off, which I see coming, don't look to Goldman, Sachs to carry huge positions of your paper that's not selling. That's not the purpose of our inventory. It is costing us a lot to carry it, to mark it up, I knew those costs of carrying big positions, and I wanted him to do two things: one, to set up additional lines of credit, and also to set up these swing lines. One way to stop this long series of negotiations was to get tougher with them, so I picked a limit, a target, five million dollars.

Q In the last paragraph on the second page of the blue sheet -- the first paragraph does not refer to swing lines -- I mean the first page, as I see it.

A Yes, it is in the center, about the second sentence in the second paragraph, I believe. "I told him it was our judgment that the news will have an adverse effect on their sale of commercial paper and we may not be able to keep out two hundred million of their notes. I said the most important thing they could do is to get another one hundred million in standbylines to back up their commercial paper and that some of these lines should be swing lines or demand lines."

Q I had overlooked that. Turning to February 6th, there is the reference to the luncheon.

THE COURT: F3?

MR. PIEL: That's F3, your Honor.

Q You have read this, you studied this blue sheet, I take it?

A Yes, sir.

Q Does it bring back to your mind anything about this conversation that you don't find in the blue sheet about the luncheon?

A I can't think of anything specific, no.

Q Do you recall whether or not Bevan mentioned that he had met with the commercial bankers the day before?

A Do I recall it?

Q Yes.

A I believe the answer is yes, yes. I believe he had. I knew that O'Herron -- shall I read this or look for it?

Q You need not read what's in here. We have that in evidence.

A What is sticking in my mind is that O'Herron told me the previous day, I believe, that he and Dave Bevan were going to go see their banks that afternoon, which would be the previous afternoon. That's in the previous blue sheet, I believe.

Q He informed you at this luncheon meeting, you said "Did a thorough job of explaining 1969's 56,000,000 operating loss in the railroad and a special write-off." That, of course, was the operating loss of Penn Central Transportation Company and not the consolidated results of the system?

A Correct.

Q Then he went on to say that "The 1970 official budget," which takes into account certain cost increases mentioned there, "shows an estimated loss of 56,000,000 for 1970."

Did that have significance to you in terms of estimating the credit worthiness?

A No, it did not.

Q Why not?

A To me this was a continuation of the trend that had been going on for several years now, which I anticipated would go on as they put these two railroads together and worked out the economies, and in fact the story that Dave Bevan was telling us at this luncheon was that the losses in 1970 aren't going to get any worse, they are going to be the same as 1969 in the operating figures of the railroad. So this looked like kind of a plateauing out to me.

Q Rather than a continuation of the decline?

A Correct.

THE COURT: May I ask a question here? We have the three exhibits, 76, 77 and 78 --

MR. PIEL: I am coming to those, your Honor.

THE COURT: -- which show the projection for 1970. What do they show on their internal papers?

MR. PIEL: Your Honor, Exhibits 76, 77 and 78 are current during the period estimates or guesses --

THE COURT: Yes, but they also have what their financial budget was for the period.

MR. PIEL: Yes.

THE COURT: Isn't that the same figure as Bevan is telling these folks at their luncheon? He said that the 1970 official budget --

MR. PIEL: Your Honor, Exhibit AZ is the financial plan. The others are merely the first quarter. 76, 77 and 78 only deal with the first quarter..

THE COURT: You mean the financial here is only for the quarter?

MR. PIEL: Yes. There are three of those. They are all during the first quarter and --

THE COURT: What does he show on that?

MR. PIEL: AZ shows a total net ordinary earnings for Penn Central Transportation Company projected for the year, a loss of fifty five million nine eight seven, exactly what he is telling them at the meeting.

Q Did the statement that the Penn Central Holding Company, that is the consolidated return, would show a profit of twenty to twenty five million dollars for the year?

MR. PIEL: Your Honor, he was there saying less than this shows. Exhibit AZ shows a consolidated profit of $34,000,000 rather than the 23 or 24 that he mentioned at this meeting.

THE COURT: Go ahead.

Q Did that have significance to you in relation to your opinion about the credit worthiness of Penn Central?

A It did not change my conclusion or judgment, but it was a positive factor in that the consolidated earnings in 1970 showed a up turn --

Q In his prediction?

A His prediction, his forecast showed that based on a $56,000,000 loss in the operating company it would produce a twenty to twenty five million dollar consolidated profit for 1970, and this is five or six times what the consolidated profit was for 1969. So I viewed this as a positive trend that was happening in here in terms of what he was telling us the forecast for the year would be.

Q Then the memorandum goes into the subject of commercial paper,the last paragraph on the first page of F3. "John O'Herron reluctantly said they already have ten million of the fifty million on a demand basis, but 'until pushing comes to shoving' he really does not want to convert the other forty million to demand lines."

What was your understanding of his reason for him not wanting to do what you were asking him to do?

A It involved someone in his treasurer's office having to take the time to activate these $50,000,000 of standby lines, convert them to swing lines, which meant that these were out in Cleveland and around the country, and it took several days to activate them, and they had to change the arrangement for using them on a demand basis, which would be right up to 12:30 on the same day. We hadn't covered our maturities by 12:30 and there was three million left over, we wanted them to be capable to go into a line within a half hour, call a bank and say "We want to borrow three million dollars." These standby lines, this $50,000,000 in back-up lines, I think under the existing arrangement took several days to activate, and somebody had to be in Penn Central's treasurer's office to change those and to activate them, and it was complicated. Actually, those swing lines should have been with one or two banks in New York where he could have borrowed ten or twenty million dollars at once. These were in $2,000,000 lines, $3,000,000 lines, $1,000,000 lines. It took a lot of work and effort in a short time span to activate them. So it was that consideration, and, really, what John was doing, in my mind, and I knew this, was it was easier to have Goldman, Sachs handle any unsold paper.

THE COURT: Your deal with Penn Central was you bought them, these belonged to you?

THE WITNESS: Yes, sir. We acted as principal and we owned them.

THE COURT: You were principal?

THE WITNESS: Yes.

THE COURT: Mr. Levy yesterday used the word "agent," and I think he misspoke himself.

MR. PIEL: I don't think I did, your Honor. I should have been saying dealer. The dealer normally handles it on a principal basis, although sometimes on an agency basis.

THE COURT: I think the other day, Monday morning when he testified, Mr. Levy used the word agent for the Penn Central. They weren't the agent, they were the principal.

MR. PIEL: That's right. Occasionally --

THE COURT: That was something else, but not in this lawsuit.

MR. PIEL: Not in this lawsuit, that's correct.

Q Was there any difference in expense to Mr. Bevan between standby line and a swing line?

A A swing line and a standby line?

Q Yes.

A It is hard to speak in specifics on this because each bank negotiates them out, but a standby line usually carries just a 10 per cent compensating balance to establish the line, 10 per cent of the line. In asking him to set up a swing line with the intent that it would be used, when you do borrow under a line of credit, there is an additional cost to the borrower, usually at 10 per cent.

THE COURT: Of compensating balance?

THE WITNESS: Yes, compensating balance.

Q Another compensating --

A It is known as 10 plus 10.

Q Is there also an interest charge on the money borrowed while it is borrowed?

A Yes.

THE COURT: I assume -- I thought I saw in one of these documents 1/8 of a per cent on something. I can't focus it in, but I thought I saw here in some document that there was 10 per cent compensating plus 1/8 of a per cent.

MR. PIEL: I think Mr. Van Cleave said that he is distinguishing the different kind of lines and testified that sometimes in addition to the compensating balance type of compensation for the standby line, there might be a fee in connection with setting it up, or a fractional interest charge.

THE COURT: Mr. Wilson has just said you negotiate that out with the bank.

THE WITNESS: May I add something to this?

THE COURT: If you want to.

THE WITNESSS: Usually the standby fees are associated with revolving credit agreements where there is a commitment for a two or three-year period or a seven-year period, and it is a fee on the unused portion usually of the revolver.

Q Whereas if you serve as the search tank in your inventory, you were paying the finance charge for that instead of the railroad in your negative carry cost?

A That is correct.

Q With regard to additional bank lines as distinguished from conversion to swing lines, the bottom of the page, you state "Both Dave Bevan and John O'Herron responded to our ideas by saying that they did not feel that they could get 100,000,000 in bank lines at this time."

What did you understand to be the reasons for that feeling on their part?

A That they didn't want to pay the costs of setting them up, there was no question in my mind that if they wanted to pay the cost they could go and get bank lines. As a matter of fact, they were already in the process, they started the previous day to go out and get $50,000,000 in the Pennsylvania company.

Q They got that a few days later?

A I think it took two weeks or so to get the agreement signed, and so on. If Dave Bevan had told me "I had tried to get bank lines from bank A, B or C, and said "Bob, I couldn't," I would have said "Why?" But he didn't tell me that. He was expressing an opinion that he didn't feel he could because of the tight money and the environment we were in.His really underlying reason in my mind, I had watched this go on for a number of months, he didn't want to pay the cost.

Q I show you Plaintiff's Exhibits F76, 77 and 78, and ask you whether you ever saw those before I showed them to you yesterday, I think?

A No, sir.

Q You were meeting with these gentlemen on February 6th. The first of these documents, F76, is dated February 6th, although since they were in New York they might not have got it yet. Did Mr. Bevan or Mr. O'Herron tell you that their budget man was reporting his guess that as of February 6th that by the time the first quarter was over his forecast was there would be a consolidated -- I mean there would be a total net earnings for the company, a figure of $78,000,000?

MR. STITT: I object to the use of the term "guess," your Honor.

THE COURT: What is it? It is a forecast. A forecast is a guess.

MR. STITT: If it had been "forecast," I wouldn't have been bothered.

THE COURT: You object to the synonym?

MR. STITT: Now that we understand what we are talking about, I withdraw my objection.

THE COURT: I don't know what else he could have been talking about. He read a figure of $78,000,000 under the heading forecast.

A He did not tell me that number.

Q Did he say that their preliminary financial plan-- there is a footnote for that, A up there, it says "preliminary financial plan," and a later -- Exhibit 77 ten days later has financial plan rather than preliminary plan and the figures are different, but, at any rate, as of this date, did he tell you that their financial plan called for a loss of $60,000,000 in the first quarter and that the budget plan was saying that it was going to be $18,000,000 more than that?

A No, he did not.

Q I want you to assume that that fact was put before you at that time. Would that have caused you to question the credit worthiness of the railroad, the prudence of offering its notes?

MR. STITT: I object to the question as calling for speculation by the witness, your Honor.

THE COURT: Overruled.

A No, it would not have.

Q Will you explain why not?

A For several reasons. One, the first quarter of earnings, whether in a financial plan or actual, historical, had been that the first quarter of earnings of both the Pennsylvania Railroad and the New York Central had been the weakest of the four quarters. So going back to the luncheon when Dave Bevan said that there would be-- he forecast a $56,000,000 loss in the operating figures for the railroad, it meant to me that the first quarter would be the weakest and other quarters in the year would make it up to get to the final number of $56,000,000. There is a second reason in my mind, that I -- basically here we are at February 9th on the forecast here, it is just into the start of the year. I am really interested in a longer range view, not every month or every day what numbers are coming in on a company this size, they can change too readily and it wouldn't mean much to me. I was interested in a longerview of six months or a year forecast for working out. Also during this period, as I said, there was substantial tie-ups of the trains because of the weather conditions, and it was very conceivable to me that they might have been taking earnings or revenues out of one period, the first quarter, the first few months, and ultimately it would show up in the second quarter.

Q When storms tie up the railroad, that backs up shipments, doesn't it?

A Yes.

Q So that there may be some compensating increase of income in a later quarter when those trains roll again?

A Right.

Q Looking closer to the date of the purchase here, P78, the same kind of a document dated March 6, 1970, and at this point Mr. Underhill is saying, although he still hasn't got all the figures and hasn't come to the end of the quarter, that there will be an $86,000,000 operating loss.

MR. STITT: May I inquire what --

MR. PIEL: In the Penn Central Transportation Company.

MR. STITT: 78?

MR. PIEL: Yes.

Q Was that difference or would the other one that you looked at make a difference in what you are saying?

A A red ink --

Q Total net ordinary earnings for the company, the prediction by the budget man here is $86,000,000 loss as compared with $78,000,000. In other words, he has raised the ante by $8,000,000. Would that make a difference in your judgment?

A No.

Q I want you also to assume -- first I ought to ask you, look at Exhibit AZ, please.

THE COURT: Would you tell me, Mr. Piel, why the figures differ under financial plan between Exhibits 76 and 78? Shouldn't they be the same?

MR. PIEL: Between 76 and 78, the explanation is that there is a footnote on the first one, the column heading financial plan has a little a. That's a footnote reference. You will see on -- I think it is cut off on the bottom of the first page in reproducing, but on the second page you will see that A means preliminary. That legend does not appear on 78. Instead it says financial plan. So they have revised it and they are in their financial plan at that point apparently at odds with the forecast. Some financial planning group and the budget man apparently weren't eye to eye on what it was because the financial plan was calling for a loss of $36,000,000 and he was predicting -- they had reduced their estimate from 47,000,000 and he was predicing actually an increase of the loss. When I used those figures I was looking at consolidated ordinary earnings at the top.

MR. STITT: May I just state for the record that I do have reservations with my adversary concerning the interpretation of this document.

THE COURT: I asked a question, Mr. Stitt.

MR. STITT: I didn't hear your question, your Honor.

THE COURT: Go ahead, Mr. Piel.

Q You have Exhibit AZ?

A Yes, I do.

Q Did you ever see that document before I showed it to you recently?

A No, sir.

Q I want you to make the same assumption, that when Mr. Bevan at your meeting told you that there was going to be a $56,000,000 loss for the year, according to their projections, which coincides with the lower right-hand corner result for the railroad company and told you that he thought there would be a consolidated profit for the sum of twenty to twenty five million dollars, whereas this projection called for a consolidated ordinary earnings of $34,000,000, and if he had handed you at that time this exhibit to study and examine, would you have found anything in it of significance to your estimate of the credit that Mr. Bevan hadn't told you?

A This document, number 1, verified the forecast he gave me on February 6th, here it is March 6th, the date that this document was written, verified the forecast which he had given me the month earlier for the total net ordinary earnings for the company, and that would be the transportation company, it was $55,987,000. But it also shows, and I would have been pleased to see this, if I had, line 4, consolidated ordinary earnings over in the right-hand column, total for the year showed an improvement over what he had told me on February 6th where he told me that based on a $56,000,000 operating loss, it was only going to be a twenty to twenty five million dollar consolidated profit. Here this forecast is showing a $34,000,000 profit. So again, given the general weaknesses of forecasts, I would have been pleased with this document if I had seen it.

Q In Exhibits F2 and F3 that recorded your conversations with Mr. O'Herron on the 5th and the discussions at the meeting on the 6th of February, 1970, there are various statements in there about the railroad's cash needs for 1970, $226,000,000, which an exhibit previously in evidence shows they also mentioned to the bankers the day before, your Honor, and then a discussion of ways and means by which they intended to meet their cash needs. Without discussing them in detail, unless Mr. Stitt in his questioning wants you to go into it, did you consider those plans for providing themselves with the necessary cash to be feasible and realistic?

A Yes.

Q There is the reference to the projected public financing, $100,000,000 long term financing in the spring.

A Yes, there is.

Q What were your expectations as to whether that would take place?

A The railroad having just completed a $50,000,000 financing in the Pennsylvania company and knowing that major corporations in this period of January, February were doing major bond deals in size, I saw no reason at all in my mind why a $100,000,000 deal could not be done.

Q Was it done?

A No, sir, it was not.

Q It was scheduled for May and didn't come off?

A That is correct.

Q For what reason was it called off or postponed?

A The syndicate offering the bond deal couldn't generate enough interest of people and institutions to buy it because of the very unsettled conditions that took place in this country at that time.

Q What are the conditions that you are referring to?

A Well, there was a whole series of them. The long term interest rates were moving higher, you had in the latter part of April and early May the Kent State incident, you had the bombings and invasion of Cambodia, you had the stock market that moved down to the lowest time in something like six or seven years, down to the mid six hundreds, I remember, and we had a number of bond issues being postponed regularly, and there was just general fear and concern in the financial community at that time.

Q I show you Exhibits EL, EM and EO for identification and ask you whether with the assistance of those exhibits you can fix for us the date of the Cambodia incursion?

A This article in the New York Times of May 2, 1970.

Q And the date of the Kent State tragedy?

A Again, a photograph and article in the New York Times dated May 5, 1970.

Q There were riots and student strikes all over the country, weren't there?

A Yes.

Q Can you fix from this the date when the stock market hit another low, the lowest it had been since April, 1963, according to this article? That was when?

A This article is entitled, Exhibit EO, New York

Times, May 15, 1970.

MR. PIEL: I offer those in evidence, your Honor.

THE COURT: Any objection?

MR. STITT: No objection, your Honor.

(Defendant's Exhibit EL, EM and EO were received in evidence.) xx

Q Were other bond issues withdrawn -- that were in registration or where there had been announcements that financings would be done, were there other bond issues that were postponed or withdrawn?

A At this time?

Q At that time.

A In May? Yes.

Q If you have looked into this, between March 1st and June 30, 1970, how many bond and debenture debit offerings were cancelled or indefinitely postponed or postponed on account of market conditions?

A 35 to 40 that I am aware of.

Q I show you a compilation of items from a publication called Eliot Sharp's Corporate News, which is our Exhibit FH for identification. Tell us what Eliot Sharp's Corporate News is?

A This is a daily newsletter put out by one of the senior reporters for the Investment Dealers Digest to professionals in the syndicate departments of the Wall Street houses and the traders in the street houses that are concerned with what the calendar of security issues is. This would be for both bonds and stock, and usually these letters gave an interpretation or feel for what those markets were each day.

Q The syndicate that's planning to put a bond issue in would love to find a day when some other issue isn't being offered, is that right?

A Yes.

Q So it is used in the regular course of business by you investment bankers for that purpose?

A Not by myself, by our syndicate department and bond traders, and so on.

Q Was this compilation made at your direction and under your supervision?

A Yes.

Q There are handwritten notations on it. On the left-hand side I take it in the margin that's the date?

A That is correct. Starting in March.My Xerox copy doesn't show the month.

Q It does show just below the middle of the first page and turning the pages that most of these postponements occurred in May and June, is that correct?

A By a quick eye scan, yes.

Q There is some other handwriting. There is a slash with letters either to the left or right of the slash. Will you explain that? There is a legend for it at the top, but will you explain it for us?

A Yes. The man that I asked to prepare this for me the other day told me that he was not able to go back to the individual prospectus for each one of these issues. We just simply didn't have them in our library. So I asked him -- and if he had, he was to find from that prospectus what the Moody's rating, bond rating and the Standard & Poor's bond rating was, if they had been obtained, if it was a preliminary prospectus, or what, and if it had been obtained and in the prospectus. In the absence of that I asked him to do the next best thing, to go the Moody's manuals, bond manuals, for that period of time in March, April, May and June, and if the bond deal had been done, to record for us what the bond rating was that that particular issue got. In the absence of that, he was to find out from Moody's manuals at about that time what the extant bond ratings were--

Q Of a particular issue?

A Of a particular company. This gave you a rough indication as to the bond quality of these particular issues.

Q So if the letter, such as in the first item, which is

March 2nd, the letter to the left of the slash, such as BB in that instance, then that means it is a Standard & Poor's rating?

A Correct.

Q And if it is to the right it means he found it in the Moody's manual?

A Correct. Or in a prospectus.

MR. PIEL: I offer it in evidence.

MR. STITT: No objection, your Honor.

xx (Defendant's Exhibit FH was received in evidence.)

Q At any time prior to March 16, 1970, Mr. Wilson, did anything come to your attention, any fact or development, which caused you to suspect that there was a risk that the notes that you were offering in the short term money market would not be paid as they matured?

A No, there did not.

Q Did anything come to your attention that caused you at any time prior to March 16th -- on or prior to March 16, 1970, to suspect that the board of directors of this enterprise might decide to file a petition for the reorganization of the railroad?

A No,sir.

Q I am going to ask you the Monday morning quarterback question, which for that reason will be of questionable assistance to the court, but if the court will permit, I would like to ask you from hindsight how you account for the fact that three months later the board of directors did decide to file a petition one Sunday for reorganization, without your having anticipated it before March 16, 1970?

A To me it is a classific example of managerial blundering.

Q Will you explain that?

A Here is this railroad that had been put together several years earlier, after years of study and investigation by the ICC, it was even challenged and went to the Supreme Court --

Q Twice.

A I don't remember that. I know it went to the Supreme Court. It was deemed to be in the public interest to put those two railroads together. It was a unique railroad in that it had operating problems from both precedent railroads.

Q And then they were handed the operating problems of the New York, New Haven & Hartford too?

A The New Haven-Hartford was added on I believe in '69. But what was unique about this railroad was the non-railroad assets. It was one of the biggest land companies in the country, I think the largest land company in the country.

and many, many of these assets, non-railroad assets, were unencumbered, and both the assets and the earnings power from these assets were available to the management, to these companies, this family of companies, to operate this railroad until they got these economies completed. In my mind, as I knew these officers of this railroad, as I dealt with them and I listened and studied what they said, to me there were many, many options, managerial options, to convert assets that they had available to cash if needed, to get them through this three, five, eight-year period, whatever, until the economies were accomplished. If I could refer to the blue sheets, I'd like to indicate right in the blue sheets the type of options that were available to the railroad that w[illegible]scussed and that I knew about, either from my own people at Goldman, Sachs or I personally had had discussions with them. They are the types of categories and the types of for instances that this railroad and this management had available to bring to bear, to get cash if they saw the need.

Q Do you consider that there was any element of a political decision to throw the problem into the lap of the government?

MR. STITT: I object to the form of that question.

THE COURT: Sustained. You don't have to go through it.

MR. PIEL: I think we can point those out in our brief, Mr. Wilson. You testified before the Securities and Exchange Commission, did you not?

A Yes, yes.

Q Were you cross-examined by your own counsel on that occasion?

A No.

Q Only by the SEC examiner?

A That is correct.

Q You have before you and have been referring to the credit file in answering questions here. Did you have that before you when you testified before the SEC?

A No, sir.

Q You did not have it before you?

A No, sir.

Q Your deposition was taken in this action?

A Yes, it was.

Q You were examined by the liaison counsel for all the plaintiffs in these various cases that have been brought?

A Yes.

Q Were you cross-examined by your own counsel?

A No. There were occasional questions to clarify something I might have said, and so on, but very few questions by my own counsel.

Q Did you have the credit file placed before you when you testified?

A As it is sitting here?

Q Yes.

A No, I did not.

Q Were you shown some things from it?

A I was deposed on several occasions, and in late December, 1970, and first few days of '71, if I have those dates correct in my mind, I did not have the documents that were in this credit file placed before me.

Q Later on a few were shown to you in further questioning?

A Yes, they were.

MR. PIEL: That is all I have, your Honor.

THE COURT: We will have a short recess and Mr. Stitt can get his ideas together and we will start the cross-examination.

(Recess.)

CROSS-EXAMINATION

BY MR. STITT:

Q Mr. Wilson, first of all I'd like to ask you a few questions on the subjects of jurisdiction and disclosure. Is it true that in 1970 Goldman, Sachs had a duty to disclose all material facts to prospective purchasers of commercial paper which Goldman, Sachs is offering for sale?

MR. PIEL: Objection, your Honor. It calls for a legal conclusion.

THE COURT: True.

MR. STITT: Your Honor, I believe this is one of the rules of the game, if I may use that term.

THE COURT: I sustain the objection.

Q Was Goldman, Sachs requestioned to keep any information on Penn Central confidential at the request of Penn Central?

A Not that I can remember.

Q I show you green,white and yellow sheets which have been grouped together and received in evidence as Exhibit F84. I draw your attention specifically to the green sheet of February 18, 1970, regarding Penn Central Transportation. I ask you, Mr. Wilson, whether such written financial information, like the green sheet that you have before you, is of significance to banks beyond the information contained therein?

MR. PIEL: I object to the form of that question.

THE COURT: I don't know what you are talking about. You are referring to the green sheet which is sheet number 1?

MR. STITT: Yes, sir, as an example.

THE COURT: Is this in evidence, F84?

MR. STITT: Yes, sir. Originally, your Honor, we had a Xerox and then we brought in the originals to substitute.

THE COURT: Go ahead.

MR. PIEL: I have an objection pending to the form of the question.

THE COURT: I sustain the objection.

MR. STITT: If your Honor please, I would like to bring out through this witness that there is significance in that commercial paper transactions --

THE COURT: Why don't you ask him questions?

Q Is it true, Mr. Wilson, that commercial paper transactions are treated by banks as loans?

A If they are buying for the account of customers, they are not.

Q And if they are buying for their own account?

A It is my understanding that a bank, if they buy for their own account, would treat it as a loan, that is correct?

Q Is it also true that bank examiners expect to find written credit information on borrowers in bank files?

A That's my understanding.

Q Prior to 1968, were savings banks authorized to purchase commercial paper?

A I don't know whether it was '68 or '67 or '6, I don't know the date.

Q I show you Exhibit F81, a copy of Mr. Bruno's letter to Mr. Lyman, then president of the Franklin Savings Bank, dated June 24, 1968, and ask you if that refreshes your recollection?

A Yes, it does.

Q Would you answer the question with your recollection now refreshed?

A Would you read the question?

(Record read.)

Q Here in New York.

A I don't think so.

Q Is it true that savings banks were first authorized to purchase commercial paper by statute enacted by the legislature in about June, 1968?

A Yes.

Q Is it true that the statute provided that such commercial paper had to have the highest rating of an independent rating service designated by the State Banking Board?

MR. PIEL: Objection. We don't need the witness' assistance on that point.

THE COURT: True.

Q During 1968 to 1970 would you tell us what rating services, if any, had been designated by the State Banking Board?

MR. PIEL: That question isn't on any issue in the case, your Honor. Mr. Bock testified --

THE COURT: I assume it is preliminary to something.

A I don't see it in this letter, and it is not clear from this letter and I don't have the legislation in mind whether they were talking about bond ratings or paper ratings.

Q Do you know of any other rating service in New York State during the period June, 1968, through April 1, 1970, other than the National Credit Office, a subsidiary of Dun & Bradstreet?

A Yes.

Q Which ones?

A Standard & Poor's.

Q Do you know whether they were approved by the Banking Board?

A I do not know.

Q Besides savings banks, were there other new investors coming into the commercial paper market in 1968 and 1970?

A Yes, there were.

Q By 1970, is it true that Goldman, Sachs alone had some 1,500 purchasing customers?

A I believe that number is correct, yes.

Q Is it true that for these customers Goldman, Sachs had some 225 approximately issuing companies?

A At any one time I don't think that's correct. In the course of a year or so, I think that number is correct.

Q Is it true that Goldman, Sachs handled these issuing accounts on an exclusive basis?

A With the exception of I believe at that time approximately six names.

Q And this would cover all commercial sales throughout the United States of that issuer?

A That is correct.

Q Of these approximately 225 issuing companies, were 47 of these issuers new issuing accounts which Goldman, Sachs took on during the period June 1, 1968, through April 1, 1970?

A I do not have that figure in mind.

Q To refresh your recollection, I will simply show you pages 1863 to 1864 of your testimony in the Welch case.

A Yes, I see that testimony.

Q 87 of these accounts had just come in during that period?

A That's what I testified to, yes.

Q And that's your recollection, is it not?

A It is my recollection I testified to that, yes.

Q It is true, is it not, that investors in commercial paper know -- speaking generally -- that Goldman, Sachs is the oldest and largest dealer?

A Generally, yes, I would like to think so.

Q And it is also true that commercial paper investors place reliance on the fact that it is Goldman, Sachs that is selling the paper?

A Could I have the first part of that question back?

(Record read.)

A Some do.

Q And it is also true that investors or some of them place reliance on Goldman, Sachs credit department?

A Some do, yes. I believe so.

Q And is it also true that some investors place reliance on the fact that Goldman, Sachs is monitoring these companies and their affairs?

A Yes, I believe that's implied in the fact that we are selling it. Yes.

Q And is this true of the new group of investors that were coming into the market during the years 1968, 1969 and 1970?

A Not having those accounts in mind, I can't answer that question. I would assume so.

Q In 1968 to 1970 -- we will just take it up through April 1, 1970, Mr. Wilson, were you responsible for the ultimate credit decisions on Penn Central or Penn Central Transportation?

A Yes.

Q Had you ever worked in the credit department of Goldman, Sachs?

A I am a little confused by the word work in that Harold Wass, one of the partners of Goldman, Sachs in my training period, was the partner in charge of the credit department and I worked very closely with him when I was on the purchasing side of paper. I worked with him a great deal. But in terms of a title or an assignment within the credit department, the answer is no. I never had such a title or an assignment.

Q You were never at any time assigned to work in the credit department, were you?

MR. PIEL: I think the question has been asked and answered.

THE COURT: He said no.

Q Did you ever work as a credit analyst at Goldman, Sachs?

A No.

Q Did you ever work as a credit supervisor at Goldman, Sachs?

A No.

Q Did you have any experience by way of any other employment outside Goldman, Sachs as a credit analyst?

A No.

Q Would you tell us as specifically as you can what, if anything, you personally did in connection with the initial investigation of Penn Central at the time or approximate time that Goldman, Sachs decided to handle its paper back in 1968, I think the time is fixed?

A I believe I have testified to that at this trial, that my role in reaching the credit conclusion that we wanted to take it on was one of my personal knowledge of the railroad officials, judgment about them, a luncheon with the chief financial officer in March of 1968, I believe several phone calls with other officers of the railroad prior to August 1, 1968. In reviewing my credit file that is in front of me here in preparation for this trial, I saw articles that were in the press which brought back to me the fact that I had that knowledge, and it was this over-view that I had and my own judgment prior to talking with Jack Vogel, head of our credit department and asking him for his conclusion of what his people had done in terms of their analysis and investigation.

Q Did you prepare any written memoranda in connection with this view, review or over-view that you have mentioned?

A Only in the fact that when we take on a name it is an indication that I have gone through that process, when we start to buy it.

Q But you didn't create any paper or prepare any document in connection with this view?

A No, sir.

Q Do you know how much time by way of hours, days or weeks that you spent on this view or over-view?

A It is very hard going back eight or nine years for me to tell you any precise number.

Q Were you or was anyone in your department evaluating Penn Central on a daily, weekly or monthly basis from the time that Goldman, Sachs started to sell its commercial paper in 1968 through April 1, 1970?

A Could I have the first part of that question read back?

(Record read.)

A I am troubled somewhat by the word "evaluating." I have indicated what my view -- what I saw my role to be as head of the department and making the ultimate credit decisions in terms of my over-view. In terms of any study or report or whatever the credit department was doing, I can't speak with any knowledge of specifically what they did during that period of time for this account.

Q Were you evaluating Penn Central on a weekly basis?

THE COURT: You mean on a periodic weekly basis?

MR. STITT: Yes.

A You mean every week Penn Central--

THE COURT: That's exactly what he is asking you.

A No.

Q Were you evaluating it on a monthly basis?

A No, sir.

Q Was anybody in the department?

A In terms of a regular structured review?

THE COURT: That's what he means, regular structured review, 3 o'clock every Friday.

THE WITNESS: Not that I am aware of.

Q Did you make any inquiry at any time in 1969 or until April 1, 1970, that assets of Penn Central on which you were relying had become encumbered?

A I am troubled by the word "inquire." Inquire of whom? I did not go out and read any specific document or check with any Moody's manuals or things like that to find out if specific assets were encumbered. I didn't think that was my job. That was the credit department's job. I did not do that.

Q I ask you, did anyone else in your department do it, to your knowledge?

A I do not know from my own knowledge whether they did or did not.

Q Do you have any recollection of discussing the credit worthiness of Penn Central with Mr. Evans, the analyst that it has been stipulated was assigned to Penn Central in 1968 and 1969?

A Is the question do I recall any discussions with him about credit worthiness?

(Record read.)

A I cannot recall any.

Q Do you have any recollection of discussing credit worthiness at Penn Central with Hoffman, the analyst it has been stipulated was assigned to the account in 1970 at any time through April 1, 1970?

MR. PIEL: I am going to object at this point. I haven't objected to this general framework that Mr. Stitt has used of up to April 1st for general practice questions, but when we get to this case and issues in this case, what is relevant is what happened on and prior to March 16th.

THE COURT: Do you want to limit his question to March 16th?

MR. PIEL: Yes.

THE COURT: All right.

Q Through March 16th, Mr. Wilson.

(Record read.)

Q March 16th, 1970.

A I cannot remember any specific discussions, though I feel in a general way when Jack Vogel wasn't around that I would have talked with him in Jack's absence.

Q Do you recall any specific instance where you did talk with Hoffman, and, if so, tell us when and what was discussed?

A No, I cannot remember any specific instance.

Q Is is true that some of Goldman, Sachs' commercial paper companies are insurance companies?

A Are companies -- I don't understand the question.

MR. PIEL: Are insurance companies.

THE WITNESS: That buy or sell paper?

Q That buy paper. I am sorry if I misled you on that.

A Yes, insurance companies do buy commercial paper from Goldman, Sachs.

Q And they have been in the market for a good number of years, haven't they, even dating back prior to 1968?

A Some of them, yes.

Q Prudential, for example?

A Yes.

Q You sell paper to Prudential?

A I did when I was a salesman, yes.

Q Continental Insurance?

A Yes, I handled that account.

Q Is it true that such large institutional buyers, such as insurance companies, have credit departments of their own?

A I can speak for the Prudential Insurance Company. Yes.

Q Would that also be true of other insurance companies generally?

A They would be more categorized as investment departments rather than credit departments, in my view.

Q But amending the inquiry to use that term, it is true that they would have these large either investment or credit departments? They would have their own analysts that could study the paper that was under consideration?

A Yes.

Q In March, 1969, did the Continental Insurance Company drop Penn Central from its approved list?

A Yes, they did.

THE COURT: When?

MR. STITT: March 24, 1969, Exhibit F26, your Honor, in evidence.

MR. PIEL: I move to strike the question and answer as being beyond the relevant period.

THE COURT: It is irrelevant, but he wants it in. I will let it in. It is meaningless to me. It has no impact on me.

Q Did you receive any information as to that fact at or about the time?

A I believe I did.

Q How did you get that information?

A I believe the salesman whose name I don't remember now wrote a memorandum or came and talked with me.

Q And that was Mr. Morris? I show you Exhibit F26 in evidence.

MR. PIEL: This is not a blue sheet. It is a white sheet.

THE WITNESS: It was a memorandum.

MR. PIEL: Not a blue sheet.

A Yes, it does refresh my recollection.

Q I am going to draw your attention, I won't read the whole document, to the statement that -- reference to a New York Times article, and it says "It was a negative article and according to their interpretation the outlook for the company is not as sound as they thought when they first analyzed the company's financial condition. Accordingly, in view of the fact that there are alternative companies whose notes are available in the open market, they decided that at the present time they would not purchase the notes of Penn Central Company."

I ask you, Mr. Wilson, to tell us the steps, if any, which you took to make inquiry as to the reasons Continental took this action or what their more recent analysis showed of Penn Central?

A Knowing the secretary-treasurer of the company, I didn't take any action at all.

Q On direct examination you testified as to a meeting of Penn Central and Goldman, Sachs officials on September 11, 1969, which is the subject of a blue sheet misdated but which is Exhibit F7 in evidence.

A May I refer to it?

Q Please do.

A September 19th, is that correct?

THE COURT: It is misdated. It should be September 11th.

Q Did you attend that meeting?

A Yes.

Q It was you and Mr. Drypolcher and Mr. Vogel from Goldman, Sachs and Mr. O'Herron, the vice president of finance for Penn Central?

A Right. That is also indicated here and that is my recollection of who was there.

Q Did you set up this meeting on the 11th, referring to Exhibit F7?

A I believe I did, yes. Not directly with John who I had not met prior to this date,but with one of his associates.

Q Was that as a result of a telephone call that you received from Mr. Loder on September 3, 1969, and I direct your attention to a blue sheet of that date, Exhibit F22 in evidence?

A Yes, that's what the blue sheet indicates, yes, and it is my recollection.

Q Is it true that Loder called you at that time concerning plans by Penn Central to request permission from the ICC to increase their outstandings from $150,000,000 to $200,000,000?

A Yes.

Q Was it as a result of that inquiry that you decided to have this meeting on September 11th?

A I am sure it was.

Q That's your best recollection?

A Yes, it is.

Q Did you have in mind any questions that you wanted to ask at the subsequent meeting on September 11th?

A I can see by my September 3rd blue sheet that I wanted to use this occasion in meeting John O'Herron, the new treasurer, and meeting with Bob Loder, if he was going to be there, to get brought up to date on any plans that the railroad had for the remaining portion of the year. So any questions I might have had would have related to that background in setting up the meeting.

Q You had a lot of questions to ask about the merger, did you not, and how it was going?

A Are you talking about on September 19th or September 11th?

THE COURT: He is referring to the note of September 3rd, the last sentence.

(Pause.)

THE WITNESS: Yes.

Q And you had a lot of questions to ask about their cash position and cash flow?

A The phrase is "we" in the sentence, not I. "We have a lot of questions to ask about the merger, cash flow and long term financing."

Q Weren't you the author of this blue sheet of September 3rd?

A Yes, I was.

Q And so it is true that you did have a lot of questions to ask about their cash position and cash flow?

THE COURT: You mean he alone or the other members of his group?

THE WITNESS: That's the distinction he is trying to draw. You asked him whether he had a lot and he says the words is "we," not "I."

Q Take it as a group, take it as you personally or take it both ways, Mr. Wilson, whatever is most convenient for you.

A The answer is yes, we had questions to ask, yes.

Q Concerning those subjects?

A Yes. As it is indicated that I must have had them in my mind or I wouldn't have written it on September 3rd.

Q And you also had questions to ask about their long term financing plans?

A Correct.

Q And you so noted these questions in your memorandum of September 3rd?

A I so noted the questions?

Q So noted these questions that you had to ask in your contemporaneous memorandum of September 3, 1969? I direct your attention to the last line or two.

A Yes, but I didn't list the questions.

Q Yes, I realize that. At the meeting of September 11th, and now referring to the sheet dated September 19th or misdated September 19th, Exhibit P7 in evidence, I ask you whether at that meeting Mr. O'Herron made any statements concerning the cash position or cash flow or cash projections of Penn Central?

A I believe he did. It is recorded in the last sentence of the last paragraph.

Q And is it true that Mr. O'Herron pointed out that Penn Central would be in a very tight cash position in the first quarter of 1970?

A That's what the sentence reads, and I believe that's what he told us.

Q And he asked if Goldman, Sachs would put out as much paper in April or longer?

A For maturity in April. Put out much paper now for maturities coming due in April, May.

Q June?

A June. I don't know what 270 days from September would be because we couldn't go beyond 270 days.

Q But did Goldman, Sachs have that request in mind in its subsequent selling effort of Penn Central commercial paper?

A I don't know whether we did or not in this particular case. You have got a rising rate market, and all our issuers would have tried to Lock in long maturities at the then current low rates if they thought rates were going higher, so I don't know whether we paid any more attention to this request than others. I am not the person to ask that question.

Q Drypolcher and Van Cleave got indicated copies of this memo, did they not?

A Yes, they did.

Q Did you ask Mr. O'Herron any specifics about this very tight cash position that he was projecting for the first quarter of 1970?

A I don't recall.

Q Did you ask him any questions about Penn Central's cash flow?

A Only in the context of the items that Jack Vogel recorded in this particular blue sheet, yes.

Q Which items are those, Mr. Wilson?

A Two come to mind, One is the fact that they were going to increase their commercial paper from 150,000,000 to 200,000,000, indicated a need for cash, and they had to get ICC approval for that, which they decided to proceed with, and, two, they were contemplating at this point a $40,000,000 financing in the Pennsylvania company. So those would be two specific items that come to mind.

Q Any others that come to mind on reviewing that document?

A John made a very, I thought, interesting observation.

Q I am referring to the document now.

A So am I.

Q Sorry to have interrupted you.

A Excuse me. In that -- it goes back to this question of putting these two railroads together and effecting economies in size. Particularly, John pointed out if-- he mentioned if the company could increase its freight car usage from a rate of 8 per cent to 13 per cent, it would mean an increase of one and a half billion dollars in revenues with a resulting very favorable impact on earnings. This at that time meant to me was an objective of trying to get greater usage of the railroad cars in the railroad, which again would impact cash flow.

Q Did he mention any long term financings which the railroad itself, the company that was issuing the paper, then Penn Central, had in mind? Or was this strictly the Pennsylvania company that was going to do the long term financing?

A He did not, but there was no distinction in my mind.

Q Did he tell you how much cash he was projecting to have on hand in the first quarter of 1970?

A No, he did not.

Q Did you ask him?

A No, I do not recall asking him.

Q Did the subject of bank liens come up during the course of this meeting? If so, would you tell us who brought it up?

A The answer is yes, the discussion of bank liens came up. I do not know who brought it up.

Q Did Mr. O'Herron volunteer to get some additional bank liens since he was going to be applying for an additional $50,000,000 in outstandings?

A No, I do not recall him volunteering to get more bank lines.

Q Would it be your recollection that it was you who brought up the subject of an increase of bank lines which I believe was then up to $100,000,000 in all or two-thirds coverage?

A I assume I did. I just don't know.

Q Is that your best recollection, that you did bring it up?

THE COURT: What did you say?

Q Is that your best recollection, that you did make this suggestion?

THE COURT: He says "I assume I did but I don't really know."

Q I direct your attention to this statement in the first paragraph of Exhibit F7: "It is his intention to use the $50,000,000 outside lines and $50,000,000 of the revolver as back-up for the $200,000,000 commercial paper. R.G. Wilson discussed the nuances of the current commercial paper market, particularly the stronger emphasis on bank lien coverage in the minds of investors. He asked if it were possible for Penn Central to get an additional $50,000,000 in lines, and John said it was, but he would prefer not to do so."

Do you recall that exchange with Mr. O'Herron?

A I do not recall the specific words, but it comes back to me that that discussion took place, from reading this blue sheet, yes.

Q In response to your request, O'Herron said that he preferred not to get these additional lines?

A That is correct.

Q He was not enamored at the prospect of doing so, was he?

THE COURT: What does that mean?

MR. STITT: That was a word that Mr. Vogel used in his testimony.

THE COURT: We are asking this witness -- at least you are asking this witness what Mr. O'Herron said.

Q Do you recall anything further as to what Mr. O'Herron said, Mr. Wilson?

A I do not recall anything specifically that John O'Herron said at this time on that matter.

Q Did I understand your direct testimony to be that you gave an affirmative opinion to Penn Central in connection with its application to go from 150,000,000 to 200,000,000 at or about this time?

THE COURT: What?

Q Did you give any opinion to anyone in connection with Penn Central's application to the ICC to increase its outstandings from 150,000,000 to 200,000,000?

THE COURT: By opinion you mean whether it is a good idea or whether it is worthwhile or whether the financial conditions of the company would permit it? I don't know what you mean by opinion.

Q Were you asked to express any views, either written or orally, on this proposed increase or relating to it, Mr. Wilson?

A I believe I was.

Q Would you tell us about that, please?

A My recollection is that John O'Herron asked whether I felt that the market could absorb an increase from 150,000,000 to 200,000,000. I said yes, I thought it could.

Q Before giving that view to Mr. O'Herron, did you consult your credit department?

A I wouldn't consult the credit department on a marketing consideration, no.

Q So your testimony is you did not consult them?

THE COURT: Why should he consult them? He is being asked can he sell it, not whether it is good.

Q Isn't it true that by going up from 150,000,000 to 200,000,000 and with the level of bank line coverage remaining at 100,000,000, the percentage of bank lien coverage for the railroad was now being reduced from two-thirds to 50 per cent?

A Yes, but I don't understand --

THE COURT: He doesn't need the credit department to tell him that.

Q On direct examination you were asked about a blue sheet, Exhibit F17 in evidence, dated November 10, 1969. Do you have that blue sheet before you, Mr. Wilson?

A Yes, I do.

Q Did you prepare that blue sheet on or about that date?

A I am sure I did.

Q In the memorandum you state, "In talking with John O'Herron, vice president, this morning about how fast we could put out the additional $50,000,000 Penn Central paper, I told him that the recent article in the New York Times financial page quoting their counsel, Mr. Cox, to the effect that Penn Central was having a very rough time with the merger could be very harmful to the sale of their commercial papor. I advised him that they may be wanting to be thinking about getting another $50,000,000 of standby lines."

What was Mr. O'Herron's response at that time to your suggestion that he get another $50,000,000 of bank lines?

A I don't know. I can assume it, but I don't know.

Q Did he get the lines?

A No.

Q Did he ever get them? Mr. Wilson, it is a stipulated fact in this case that Penn Central had no more than 50 per cent bank line coverage from November, 1969, through June 21, 1970. Does that refresh your recollection?

A From what dates, please?

Q From November, 1969, through June 21, 1970.

A I believe that's correct.

Q So he didn't get these lines, did he?

A He got other lines but he didn't get $50,000,000 in the transportation company.

Q He had $100,000,000 at this time in two different groups, did he not? $50,000,000 of revolver coverage and $50,000,000 in back-up?

A Yes.

THE COURT: For the commercial paper?

Q For the commercial paper?

A That is correct.

Q Is it your testimony that he did get additional lines to support the commercial paper?

A No, I didn't testify to that. No.

Q Did you make any inquiry of Mr. Cox concerning the nature of the very rough difficulty with the merger that he had expressed in his statement as reported in the Times?

A No.

Q Wasn't the merger one of the subjects which you had intended to take up with Penn Central officials at your meeting in September? I refer you to your blue sheet F22 of September 3, 1969.

A I am lost in that question.

(Record read.)

A I believe we talked about the merged railroad on September 11th, so I don't understand the word "intend."

Q Getting back to September 11th, what were you told then about how the merger was going?

A My reference to that is in terms of the -- that last paragraph where John O'Herron was pointing out his -- how familiar he was with the merged railroad and some of the ideas that obviously had been considered with him in the new position of treasurer.

THE COURT: Wait, wait. You are relating the blue sheet of September 11th to the blue sheet of November 10th regarding Cox?

MR. STITT: Yes, sir.

THE COURT: How could this witness have brought up at the September 11th meeting the Cox statement?

MR. STITT: I am not suggesting he brought up the Cox statement. I am suggesting that, if your Honor will look at the last two lines of F22--

THE COURT: I am familiar with those.

MR. STITT: -- that the merger was one of the subjects to be brought up at this meeting of September 11th.

I am trying to pursue it further and find out from this witness what information he got from O'Herron as to the status of the merger and how it was working out.

THE COURT: You mean not the status of the merger. It had merged already, had it not?

MR. STITT: Oh, yes.

THE COURT: You mean how it was working out and the impact on the financial condition of the merged company, I assume is your question.

MR. STITT: Yes, sir.

THE COURT: Now, Mr. Wilson, did you discuss with O'Herron on September 11th as indicated by Exhibit F7 any impact of the merger on the financial condition of the new company?

THE WITNESS: I can't recall in that it is not recorded in the blue sheet.

Q So you have no recollection of having done so?

A No. I don't have any recollection of having done so.

Q When you saw this article and--

THE COURT: What article?

Q Referring now to the Times financial page article quoting Mr. Cox and referred to --

THE COURT: Referred to in Exhibit F17.

MR. STITT: Yes, sir.

Q Would you tell us whether you took any steps to find out what Mr. Cox had in mind when he was referring to a very rough time that Penn Central was having with the merger, to use your words?

A I don't recall asking any questions regarding the article that was in the New York Times financial page about the problems of the merger, whatever they were.

Q Did you take any steps to find out from Mr. Cox or anyone else as to this very rough difficulty with the merger that he was referring to?

A No, I did not.

Q From your direct examination, did you testify that there were two reasons why you discounted Mr. Cox's statement?

A I don't recall my direct testimony, but I can think of two reasons right now that come back to me. I don't know whether they are the same two reasons.

Q First of all, didn't you testify on direct that one of the reasons for discounting Mr. Cox's statement was that he was not inside counsel for the railroad, but rather a member of the Washington firm of Covington & Burling?

A I remember testifying to the fact that he was outside counsel and there were hearings at the ICC about another merger, the B & O and the C & O, and the Penn Central was opposed to that merger and he was Penn Central's counsel at that hearing to discourage the B & O and C & O to merge.

Q Did you attribute any significance to the fact that Mr. Cox was a member of the Covington firm as opposed to a house counsel or on the house counsel staff of Penn Central?

A At that time?

Q Yes.

A No, I don't believe so.

Q Is it also true that, as you testified, I believe, on your direct examination -- correct me if I am wrong, Mr. Wilson -- that a second factor was that you had been previously told by Mr. O'Herron on October 22nd, this is Exhibit F20 in evidence, that Penn Central would show a small loss in the third quarter but anticipated the fourth quarter would be in the black with a good improvement?

A Yes, I did testify to that.

Q I don't want to get too far ahead of things, but on February 4th Penn Central reported losses for the fourth quarter, did they not, as opposed to this profit with a good improvement that Mr. O'Herron had predicted on October 22nd?

A Yes, they did.

Q And that news came as a complete surprise to you, didn't it, Mr. Wilson?

A It came as a surprise. Whether it was a complete surprise-- yes, it was a surprise. I was anticipating one set of numbers, a black number, and it was reported a red number.

Q Mr.O'Herron's prediction of October 22nd having not panned out, did you then take any steps to contact Mr. Cox or anyone else to find out what difficulties Penn Central might have been having, what financial difficulties they might have been having with regard to this merger?

A No, because I was going to meet with the chief financial officer and the treasurer the next day.

Q Did you ever follow up on the information contained in your blue sheet of Exhibit F17, November 10, 1969?

A By follow up you mean have any discussions with Mr. Cox?

Q Or his office.

A No.

THE COURT: You are comparing, Mr. Stitt, the F2 exhibit, February 5, 1970, with the F20 exhibit of October 22, 1969.

MR. STITT: And also F17, your Honor.

THE COURT: The former indicates an operating loss for the year. It doesn't indicate what happened in the fourth quarter.

Q Is it true that there was a loss for the fourth quarter of 1969?

A Yes.

Q And would it refresh your recollection if I were to suggest that that was $16,000,000?

A I don't have the exact number in mind, but I believe I testified that there were two unusual --

THE COURT: Wait. Is it agreed that the fourth quarter loss was $16,000,000, Mr. Piel?

MR. PIEL: Your Honor, in Exhibit A, the Penn Central press release of February 4th, and it says that Penn Central Transportation Company had a fourth quarter loss, operating loss, that is, of $16,000,000, and a fourth quarter consolidated result showed a deficit of $13,000,000 compared with 36 for the same quarter -- $36,000,000 deficit for the 1968 quarter, net earnings of 36.

THE COURT: All I am interested in is the operating loss for the fourth quarter of Penn Central Transportation.

MR. PIEL: It was $16,000,000 compared with a loss of 19 in the third quarter.

Q Do I understand from your direct testimony yesterday that it was your understanding that Penn Central was using the proceeds of its commercial paper sales for working capital purposes?

A I think I testified that was waht I assumed it was for.

Q Was that understanding or assumption true for the years 1968, 1969 and through March 16, 1970?

A Yes.

Q I show you Exhibit F48, report of the Interstate Commerce Commission served November 6, 1969, approving the increase up to $50,000,000. Did this report come to your attention, Mr. Wilson?

A At some point. I don't know when. Yes.

Q Can you tell us when with reference to the first half of November, 1969?

A I don't understand the question.

Q Do you recall approximately when you examined this report?

A I do not recall when I examined the report. I think it was -- I don't remember when.

Q Is it true that from the fall of 1969 to the spring of 1970 you did not know whether Penn Central was using its commercial paper proceeds for current purposes?

A I assumed it was. I can't testify that I knew.

Q Did you make any inquiry as to such use?

A Not that I can remember.

Q Now I'd like to move ahead to the events of February 4th, 5th and 6th, 1970. I believe you testified that on the afternoon of Wednesday, February 4th you received word for the first time that the railroad had sustained a $16,000,000 operating loss for the first quarter or for the fourth quarter, excuse me, of 1969?

A I do not believe I testified to that.

Q Is that the fact?

THE COURT: Is what the fact?

Q That you did receive news that the railroad was going to sustain a loss for the fourth quarter for the first time on the afternoon of February 4th.

A I do not know that.

Q Do you recall being in your office that afternoon?

A Yes.

Q And do you recall some news coming through about Penn Central on the ticker?

A Yes.

Q What news was that?

A It was garbled, it related to, as I remember it, the operating results for the year of the railroad and the consolidated profit for the year and the $125,000,000 charge of some kind, and I didn't know whether that was to net income or on the income statement or how it was being treated.

It was so garbled, I don't know. My only distinction I am making here, I don't remember any quarterly results. There could have been, but I don't remember any right now.

Q I show you page 133 of your examination before trial and ask you whether the testimony contained on that page would refresh your recollection.

A It does refresh my recollection of what I testified on this date.

Q Would you give us your recollection now refreshed?

A All that reading means to me is that I testified on that date that the fourth quarter results were that garbled news. It doesn't refresh me now that I remembered it then.

Q In any event, as a result of this news on the ticker, did you take any steps during the remainder of that day or during the evening?

A Yes, I did.

Q What did you do?

A Whoever was left in the office at this time, whether it was 5:15, 5:30 or a quarter of 6, any one of people like George Van Cleave or Jack Vogel, I would have talked with about it. Then I decided -- I probably called Gus Levy's office to find out if he was there and I learned that he was in St. Louis, and I called him from home at night.

Q Did you reach Mr. Levy in St. Louis by telephone from your home that night?

A Yes, sir, I did.

Q Will you tell us what you said to Mr. Levy and what Mr. Levy said to you during that telephone conversation?

A I don't remember the exact language of that phone call.

Q What was your purpose in calling Mr. Levy in St. Louis that evening from your home?

A My recollection of the reason that I called Mr. Levy in St. Louis is from my home was to inform him of this news, even though it was deficient, I didn't know exactly what it was and I wouldn't know until the next morning when it was in the press, to alert him to the fact that this had come across the tape, this was an account that he was the primary contact for at Goldman, Sachs, and my role as one of his partners was to keep him informed of companies where he is the man contact.

Q Did you have in your own mind before you made that telephone call that you ought to meet with some Penn Central financial officials?

A I don't remember.

Q Did you make a request of Mr. Levy to set up a luncheon meeting with any Penn Central officials?

A Are you talking about the evening, that evening I called him in St. Louis?

Q Yes.

A I don't believe so. I don't think so. Possibly, but I don't think so.

Q I show you your testimony at page 159-160 --

A Testimony where?

Q This is on examination before trial, Mr. Wilson, on -- I believe the adjourned date of the examination is December 29, 1969, and I direct your attention--

THE COURT: What is that?

Q I'm sorry, 1970, and I direct your attention to testimony beginning at the bottom of page 159 and going over to page 160. I will put that in front of you.

A Yes, I finished reading the testimony.

Q Does that testimony refresh your recollection as to whether or not you made any request of Mr. Levy in your telephone call to him that night?

A No, it does not. It refreshes my recollection that that is what I testified to when I didn't have my credit file in front of me, but it does not refresh my recollection that that is what happened.

Q Were you asked these questions and did you give these answers beginning at the bottom of page 159 of your examination before trial:

"Q It is a lot of money, it sure was. How was the conversation with Mr. Levy left?

"A As I remember it, I made a request to meet with--to ask him to set up a luncheon appointment where he and I could meet with Dave Bevan and John O'Herron.

"Q Did he do so?

"A He agreed to do so and in fact he did.

"Q When did this meeting take place?

"A At lunch on February 6th.

"Q Where?

"A Recess Club.

"Q In New York City?

"A Right."

Did you give those answers to those questions?

A Yes, I did.

Q I take it from Exhibit F3 in evidence, the blue sheet of February 6th, that Mr. Levy was successful in arranging that luncheon meeting?

A I cannot testify to you that I know who or how the mechanics of setting up that luncheon came about. It just escapes me.

Q Who was the host at that meeting attended by Mr. Levy, yourself and Messrs. Bevan, O'Herron and Loder, referring to Exhibit F3?

A I believe it was in my name.

THE COURT: You mean you signed the tab for the lunch

THE WITNESS: Yes, sir.

Q Does Mr. Levy also belong to the Recess Club?

THE COURT: Oh, come on, Mr. Stitt.

Q The following morning you telephoned Mr. Hemphill, your consulting partner in Chicago?

A The following morning after the luncheon?

Q I'm sorry, I apologize. Taking up now subsequent to your telephone conversation with Mr. Levy on the night of February 4th, do I understand that you called Mr. Hemphill in Chicago the following morning.

A Having read through these blue sheets and seeing that I state in here that I called him the next morning, my answer is yes. That's my recollection.

Q You are referring to your blue sheet of Exhibit F2 dated February 5, 1970?

A Yes.

Q What caused you to call Mr. Hemphill? Was it anything that Mr. Levy might have said?

A No, I don't believe so.

Q Would you tell us what you said to Mr. Hemphill and what he said to you during that conversation?

A I can't remember the specifics of that conversation. In fact, I remember very little about it.

Q Would you tell us what little you do remember about it?

A The fact that it is recorded in this February 5th blue sheet and that I obviously called him or I wouldn't have put it in the blue sheet.

Q You recall nothing else about the conversation except a blue sheet shows you called him and apparently talked about Penn Central?

A To me, my best recollection would be that it was an opposing where I was opposing one of my partners about this situation.

Q Proceed further on February 5th, on that date we did have the newspaper publication of the 1965 year and fourth quarter operating losses for Penn Central Transporation Company?

A Correct.

Q And they were respectively $56,000,000 for the year and $16,000,000 for the fourth quarter?

A I accept that, if that is what they were. I don't have those numbers in front of me.

Q Proceeding to some other events on that date, we had, first of all, the telephone call from Mr. Rogers to to Mr. Vogel -- from Mr. Rogers of NCO to Mr. Vogel as set forth in your blue sheet F1 or Mr. Vogel's blue sheet of February 5th, F1, and your blue sheet of February 6th, is that true?

THE COURT: We will adjourn for lunch until 2 o'clock.

(Luncheon recess to 2 P.M.)

AFTERNOON SESSION

2:10 P.M.

ROBERT WILSON, resumed.

CROSS-EXAMINATION CONTINUED

BY MR. STITT:

Q Just before lunch we were proceeding with February 5th, Mr. Wilson, and I believe I would simply call attention to the telephone call from Mr. Rogers of NCO to Mr. Vogel on that date as confirmed by the blue sheet, Exhibit F1 in evidence. I ask you, were there any developments on that date with regard to Brown Brothers Harriman & Company?

A Excuse me, I don't understand which day we are on.

THE COURT: February 5th.

Q We are on the 5th, but I would direct your attention to the blue sheet for February 6th, F3, which I think would relate back, the second page.

A Yes.

Q Tell us of those developments, please.

A I am referring now to the February 6th blue sheet which I wrote, and I did not refer to Brown Brothers Harriman by name in that blue sheet, but I related to Dave Bevan and John O'Herron that one of the large New York firms that bought commercial paper of Penn Central and at some time in the past -- and I don't think it relates to the $200,000,000 of outstanding -- held at one time at least 15 per cent of whatever the outstandings was, and only yesterday they had temporarily removed their name from the approved list.

Q By yesterday you mean February 5th when that occurred?

A That is correct.

Q At that time on February 5th were the outstandings of the Penn Central Transportation commercial paper approximately $200,000,000?

A Approximately, yes.

Q So the Brown Brothers account for its own account for its customers represented a substantial source of cash or a substantial potential cash source for Penn Central, did it not?

THE COURT: What do you mean by a potential?

MR. STITT: If you multiply 15 per cent, your Honor, by $200,000,000 you get $30,000,000.

THE COURT: Which may not be much in relation to the total amount.

MR. STITT: Your Honor, I have to do it brick by brick.

THE COURT: I don't know what "large" is. 15 per cent may be small. It is not the amount of money involved. It is the percentage of it.

Q Your recollection on February 6th when you had this conversation with Bevan an O'Herron, without mentioning Brown Brothers' name, was that it had purchased as much as 15 per cent at any one time of the level of outstandings?

A Yes. It could have been 100,000,000 or 150,000,000 or 200,000,000. It is a past tense, has bought.

Q Did you get any reaction from Mr. Bevan or Mr.O'Herron or Mr. Loder as to this news that this firm, still unidentified, but having purchased up to 15 per cent of the outstandings, did they react in any way? Did they request you to do anything?

A Yes.

Q Tell us.

A My recollection is that they asked would I set up an appointment for them to see that firm.

Q Did you try to set up that appointment?

A I believe I did, yes. Not personally. I didn't call Brown Brothers, but I arranged to have contact made with one of our people.

Q Through whom did you arrange this contact?

A I cannot remember the name of the salesman at Goldman, Sachs that handled the account, but it was through that salesman.

Q Would that be Mr. Anczarki?

A It is very possible.

Q What were the results of this effort on your behalf to set up this appointment? Would this be for Mr. O'Herron to see this firm which he still didn't know the name of?

A I believe it was. It is not clear in my mind whether it was for he or for Dave, Dave Bevan.

Q Either O'Herron or Bevan?

A I believe so, yes.

Q Did there come a time when you learned anything as a result of the overture that was made and the result?

A Yes.

Q When was that, Mr. Wilson?

A I can't fix the exact date. I remember reading it some place in the blue sheets that I did that.

THE COURT: Keep on reading and you will come across it.

Q Refer to the blue sheet for February 12th, Exhibit F4 in evidence.

A Yes, there it is. May I read the blue sheet?

THE COURT: Read it to yourself and then answer the question.

THE WITNESS: That's what I meant, read it to myself.

(Pause.)

Q Having read Exhibit F4, can you tell us what word you got back from Mr. Anczarki or whoever else you may have asked to make the contact?

A The word back was that the people at Brown Brothers on the trading desk that had the approved list would prefer not to meet with the railroad officials.

Q This is your blue sheet of February 12th, is it not, Mr. Wilson, Exhibit F4?

A That is correct.

Q I draw your attention to the statement "I told John that the large investor who had temporarily taken their name off their approved list did not wish to meet with him to review the 1969 figures as they felt it would be awkward."

What did you intend to convey by the use of the word "awkward"?

A I believe what I meant by the word "awkward" in this situation was that the counterpart at Brown Brothers on the trading desk that Bob Anczarki, if he was the salesman, was dealing with did not want himself, evidently, Bob Anczarki's counterpart, did not want to have a meeting with the officer or officers of the railroad.

Q Did that representative of Brown Brothers feel that they might be subjected to some sort of pressure or salesmanship? I am just trying to probe, Mr. Wilson.

A No. I would think that the implication that I got from this feedback was, here is a man on the trading desk that buys for the account of customers and works from an approved list, has one of the names taken off, and he doesn't want -- and there is Brown Brothers that has a $2,000,000 line of credit to the railroad, that he doesn't want to get himself in between the loan officer and the credit committee and his bross when he is just on the trading desk. It is that type of awkwardness.

Q It wouldn't be the chap at the trading desk who would make a decision of this sort, would it, in the normal course? Wouldn't it be at a somewhat higher level?

A What decision?

Q To remove the name of Penn Central Transportation--

THE COURT: That isn't what your question was. Your question is what the witness mean by the word awkward, and he is interpreting it for you.

Q Is there anything further that you recall of that information that you received from Anczarki or whoever made the contact?

A No, I believe that's the totality of it.

Q Did you pass this information on to Mr. O'Herron and Mr. Bevan?

A Yes, the blue sheet indicates that I told John O'Herron on the 12th.

Q At that time did he guess the identity of your customer?

A Yes.

Q Did he tell you how he was able to do that?

A I don't remember.

Q To your knowledge, did Brown Brothers ever buy any more Penn Central commercial paper from Goldman, Sachs between February 12, 1970, and June 21, 1970, the date of the filing of the reorganization petition?

A I do not know.

Q You don't recall their having bought any?

A I do not know if they did or they did not.

Q Proceeding with February 5th, did you call O'Herron that morning, referring back to Exhibit F2?

A I believe I did, yes.

Q Was that after or before you talked with Mr. Hemphill?

A I just can't tell from this blue sheet, and I have no independent recollection.

Q If we are to take the order of the blue sheet, you mentioned the call -- I direct your attention five lines down, "Having talked with GLL," I presume Mr. Levy, "last night and JCH this morning," I presume Mr. Hemphill, "I called John O'Herron, vice president of Penn Central Transportation."

Does that refresh your recollection as to the order of these telephone calls?

A It is the order that appears in the blue sheet, but I can't tell you with any certainty that that is the order of the phone calls. I believe it was.

Q During this conversation, did you ask O'Herron what Penn Central's cash picture looked like for the first six months of 1970?

A Yes, I did.

Q And did you get a response from Mr. O'Herron?

A Yes, I did.

Q What was his response?

A He said, and I am quoting from the blue sheet, he said "It is very tight."

Q Do you recall anything else that Mr. O'Herron said concerning the very tightness, if I may coin that phrase, of the cash position for the first six months of 1970?

A No.

Q Did you ask him for any specific? Did you ask him how tight or what his cash position was on that day?

A No.

Q Did you ask him about any specific projections of his cash position for the remainder of the first six months of 1970?

A Are you talking now about the cash balanaces that he has with the various banks and the level of those? Are you talking about his capital needs and how he was going to raise the remaining needs?

Q No. I am talking about cash in the bank that he can use on a day-to-day basis.

A No, I did not ask him how much cash he had in the bank.

Q Did you ask him about how much cash he was projecting for the remainder of the six-month period, first half of1970?

A No.

Q Do you recall anything about the very tightness of the cash position beyond what is recorded in the blue sheet?

A No, I do not.

Q I draw your attention to the second paragraph of this memorandum, and the following statement: "I told John it was unfortunate that we did not have some indication of the magnitude of the total losses for 1969 as we were going to need a story to tell existing holders of Penn Central's paper and new purchasers of paper. I told him it was our judgment that this news will have an adverse effect on their sale of commercial paper and we may not be able to keep out $200,000,000 of their notes. I said the most important thing they can do is to get another $100,000,000 in standby lines to back up their commercial paper and that some of these lines should be swing lines or demand lines. He said that he did not think that the banks, as tight as they are, could get $100,000,000 in standby lines."

Did you pursue that subject of additional lines with Mr. O'Herron beyond what I have just stated?

A My recollection is only refreshed by what is in this blue sheet, that I went on to describe what other companies were doing in getting Euro-dollar lines of credit as back-up lines, where the amount charged would be the Euro-dollar rate and that Euro-dollar rate was usually higher than the prime rate being charged by commercial banks in the U.S.

Q You told us this morning what you concluded from Mr. O'Herron's statement as to why he did not think he could get these additional lines. Did Mr. O'Herron make any statement to you as to his reasons why he did not think he could get these additional lines?

A No, I don't recall any comments on that regard.

Q Did he make any statements, for example, about being borrowed up to the hilt with his domestic banks?

A He wasn't. I don't recall that--

Q You don't recall any such statement?

A No.

Q Did he make any reference to the tight money situation which then prevailed?

A I can't recall any.

Q Was there any discussion as to what collateral the Penn Central Transportation Company might have to put up to obtain such a commitment of $100,000,000?

A I wasn't contemplating to get standby lines that you don't put up collateral. They are unsecured. So I wouldn't have asked him that question.

Q You didn't have any discussion with him as to what assets he might have for borrowing money at that time either on a short term or long term basis?

A I don't recall any discussion at this time in that regard.

Q You mentioned these Euro-dollar lines. I ask you, as of Monday, March 16, 1970, had Mr. O'Herron reported back to you concerning any efforts or any success or any failure in getting Euro-dollar lines of credit to back up the commercial paper?

A As of when, now?

Q March 16, 1970.

A I don't believe I had any discussions with him in the intervening period from February 12th to March 16th certainly that were recorded in blue sheet forms. I could have had other discussions, but they are not recorded.

Q Do you find anything in your file prior to March 16th which indicated that Penn Central Transportation had been able to get additional bank lines to support its commercial paper, either domestic or foreign?

A No.

Q And in fact, they never got any additional lines right up through June 21, 1970?

A They got $50,000,000 of additional lines in the Pennsylvania company, unsecured.

Q You are referring to the bridge loan of February 5th?

A That is correct.

Q But that money wasn't earmarked or segregated for the protection of the railroad's commercial paper holders, was it?

A No.

Q Continuing with this blue sheet, Exhibit F2, I draw your attention to the following statement: "I told him," that is O'Herron, "Goldman, Sachs is going to continue to offer their paper, not only the $15,510,000 in inventory, but also the maturities as they came due. When I said that our procedures in the future would probably be set up so we handle their paper only on a 'tap' issue basis where Goldman, Sachs did not inventory their notes, he said that this was something he would have to refer to Dave Bevan, chairman of the finance committee, and 'He and Gustave Levy can talk about that.'"

I ask you, can you give us in your own words the exchange that you had with Mr. O'Herron concerning this news that you disclosed to him on February 5th of ceasing to inventory his notes and going on a tap issue basis?

A I have no independent recollection of that specific discussion, other than as recorded in this blue sheet.

Q Did he state any reason as to why this should be kicked upstairs, if I may use that vernacular, to Mr. Levy on the part of Goldman, Sachs and Mr. Bevan on the part of Penn Central?

A He didn't have to. I knew.

Q All right, would you tell us what you knew?

A This was part of the negotiation going on. I stated my position. He said "All right," to himself, "I will go over your head. We will try to take this out of your hands, Bob." That is what he is saying.

Q In the past, for example, during the month of January, Goldman, Sachs had been inventorying Penn Central commercial paper on a daily basis of around $15,000,000, had it not?

A I don't have the exact figures, but I believe that's correct. I think at times it was higher and at times it was lower.

Q Yes, sometimes it got up even as high as 20 and 22 million dollars?

A I don't recall the 22 number.

Q But as high as 20?

A I believe so. 19,000,000, anyway, yes.

Q Right. So if we assume a potential range of, say, 15 to 20 million dollars, that meant that the Goldman, Sachs inventory in itself was a source of cash or a potential source of cash representing perhaps 7-1/2 to 10 per cent of the commercial paper outstandings, isn't that so?

A The calculation is correct that it is that percentage.

Q To probe your recollection further, was it the loss of this haven for unsold notes and this potential source of cash that Goldman, Sachs' overnight inventory procedures that disturbed Mr. O'Herron?

A I think it disturbed him. I think it was something he preferred to have us pay for. He didn't want to absorb the cost of setting up the swing lines.

Q If Goldman, Sachs was no longer going to inventory the notes, this additional paper would have to be absorbed by the market or paid for by Penn Central, isn't that so?

A Correct.

Q I am going to call your attention to the next statement in the blue sheet for February 5, 1970, Exhibit F2 in evidence, third paragraph, Mr. Wilsoon:

"In the past he had told us that he would be willing to take us out of our position in Penn Central and put it in the revolving credit agreement if we asked. I asked if we were to request he do that on the $15,510,000 Penn Central notes we now owned, would he. He said he didn't think he wanted to do that today as the New York banks he is going to see this afternoon to set up the additional $50,000,000 five-month lines are the same ones he would have to contact today, and he didn't feel this was very good strategy. I concurred with this reasoning. He then said he had talked with some of his banks who are in the $50,000,000 back-up lines for the paper and was prepared to buy back $10,000,000 of their notes from us Monday, February 9th, to which I agreed."

First of all, does the statement that I read following "concurred with his reasoning" and continuing, "He then stated he had talked with some of his banks," does that indicate that you are referring to two different telephone conversations with Mr. O'Herron on February 5th?

A I can't tell from this blue sheet. I don't think so. Possibly, but I don't think so.

Q It is true, is it not, that you wanted Mr. O'Herron to buy back your entire position on that very day, if it could be arranged?

A No, I don't think I asked him to do that.

Q I direct your attention --

A I asked him a hypothetical question.

Q I direct your attention to the phrase in your blue sheet, "He said he didn't think he wanted to do that today." Does that refresh your recollection as to whether you had asked Mr. O'Herron to buy back your position on February 5th?

A No, I don't think it does. That answer that you just read is in response to a hypothetical question, if we requested, is my language. So, no, I don't remember saying to John O'Herron "I want you to buy back our inventory," whatever it is, fifteen million one, I didn't ask him that, to my knowledge.

Q You were the one who brought up the subject, were you not? Weren't you babying up to it?

A No. The purpose -- no.

Q Why did you bring up the subject at all?

A I was trying to find out in my mind at this time, I believe, whether he was prepared to activate his existing $100,000,000 of back-up lines and to what amount.

Q And since he indicated he was, you were prepared to take $10,000,000 of that and reduce your inventory position by two-thirds?

A That statement is correct, yes. Sure.

Q I direct your attention to this portion of the statement: "He said he didn't think he wanted to do that today as the New York banks he is going to see this afternoon to set up the additional $50,000,000 five-month lines are the same ones he would have to contact today, and he didn't feel this was very good strategy."

What was Mr. O'Herron referring to there?

A If he was going to call on bank A that already had a line of credit to Penn Central Transportation --

Q One of the back-up lines?

A It is not clear from this whether it was one of the back-up lines or one of the revolving credit line banks, it is not clear.

Q One or the other?

A One or the other.

Q Okay, proceed.

A That if there had not been activity in that particular line for a while, that why go call on a loan officer on that day where there would be a loan put on in the morning and then go with the other -- during the same discussion ask him to be part of a $50,000,000 new line to t Pennsylvania company.

Q By new line you mean switching from back-up to demand or swing line?

A No, no, no, I am talking about the $50,000,000 of lines to the Pennsylvania company, the bridge loan. That's what he was going after.

Q I see, he didn't want to jeopardize that proposed loan?

A I just think when a man is going in to see a loani officer, his earnings are just out in the paper, that he ough to be in with a very clear proposal that he would like to achieve, and this was a simplified way to do that. I though that was good strategy.

Q In other words, you and O'Herron felt, and I don't want to put words in your mouth and you correct me if I am wrong, you and O'Herron felt that one of these banks that you mentioned, bank A or bank B, might have reacted unfavorably to information that this credit was being requested so that Goldman, Sachs' inventory could be reduced by two-thirds?

A No.

Q What do you mean, Mr. Wilson?

A I am just saying, to go to a group of banks or a bank and go in with a proposition to set up a $50,000,000 bridge loan in anticipation of doing a $100,000,000 bond deal, that in itself can take up an awful lot of time and explanation and ask for that line to be granted. If the bank saw that there was activity on the same day, there could be questions asked, "Are you going to be borrowing the full amount of your existing line, part of them? What are your intentions in this regard?" So you and O'Herron just felt it wouldn't be good bargaining strategy with the banks who were being invited to participate in this bridge loan if at the same time they were requested to make available a back-up line or swing line to buy back two-thirds of the Goldman, Sachs commercial paper inventory?

A I don't understand that question. First of all, it wasn't my strategy, it was O'Herron's strategy, but I am concurring with it.

Q You agreed to it, didn't you?

A I thought it was a good idea. But I didn't understand this last question.

MR. STITT: Would you repeat the question to the witness, Mr. Hennefeld.

(Record read.)

A It is very hard for me to answer that question in that there were a group of banks involved in both the standby and the revolving accounts. I didn't know which bank or banks John was seeing that afternoon, and I had no idea which bank or banks he would have put the -- had drawn down upon to buy our $10,000,000 of inventory. So it is very hard for me to answer that question.

Q Let me ask you this question. Previously I drew your attention to a statement in the earlier paragraph that you told him or "I told him Goldman, Sachs is going to continue to offer their paper, not only the $15,510,000 in inventory but also the maturities as they become due." I ask you, did O'Herron ask you whether Goldman, Sachs was going to continue or discontinue sales on February 5th?

A I don't believe he did. I think that is information that I volunteered to him.

Q What compelled you to make that statement to Mr. O'Herron that Goldman, Sachs was going to continue to sell his commercial paper notes?

A I think that concept came about as a result of my being firm on the fact that we were going to take a smaller inventory position or work on tap issue and that it could have been part of my explanation of backing off from that very strong position of no inventory of a $5,000,000 inventory to let him know that we are still going to handle what we had and would continue to buy paper.

Q Were you indicating to O'Herron tht if he accommodated you on this lower inventory and then ultimately a tap issue basis, that Goldman, Sachs would continue its commercial paper sales effort?

A Could I have the first part of that read?

(Record read.)

A No, I don't think there is a connection between that.

Q Do you have any further recollection as to your reasons for making this statement to O'Herron that you were going to continue or Goldman, Sachs was going to continue to sell their paper?

A The only thing I can add to this in my mind as I go over these sheets and as I try to recollect the discussion is that I was anticipating a run-off in these outstandings as a result of the year end earnings, both consolidated and in the railroad, that I felt certain investors in the market were not going to buy their paper, and that for us to do the best job we could for them in marketing their paper, that they should get some swing lines and they should bring their line coverage up to 100 per cent. I was having trouble making this point felt and at home, and I decided to dig in and say we are going to have -- we are going to tap issue. It is interesting, as of the 5th I don't talk about any inventory and then on the 6th I accommodate some inventory for 5,000,000.

Q You put the 5,000,000 limit on the 6th.

A And the target--

Q The target doesn't appear in that memo, does it? Doesn't it say it would be your limit, 5,000,000?

A Clearly we were over that, and I am the one that thought of it, so I am the author of it.

Q I put it to you, do you find the word target in Exhibit F3?

A Wait a second. This is not a verbatim transcript of what he said, and don't try to make it such.

Q Please go ahead with the thread of your answer.

A As I go back and try to put this conversation together and as I read this blue sheet and as I recall it, we wanted to do everything we could to do the best job for them in representing them in the market, and I felt by getting full line coverage and getting swing lines it would accommodate our sales effort, our marketing effort, in this regard. As it turned out, with the help of the swing lines we were able to sell paper and to keep the outstandings up for some time at the $200,000,000 level.

Q You mentioned that you anticipated a run-off as a result of the publication of the '69 earnings, annual and fourth quarter?

A Correct.

Q Would you explain for us what you mean by the term run-off?

THE COURT: We had it described five times in this trial, Mr. Stitt.

Q How much of a run-off did you expect at that time?

A I believe my blue sheets on the 5th and the 6th talk about 50,000,000 to $100,000,000. That was my judgment as to what I thought the run-off would be.

Q And you thought it was the fourth quarter losses that would trigger that?

A The write-off of the assets, the $125,000,000, the year end, the total year results, both consolidated and in the railroad company. That, coupled with the fact that those investors that had an arbitrary test on line coverage, the combination of these things now might say "Let's take that name off our list and we will buy some other name until this gets -- until the first quarter -- until lines get in to get 100 per cent," or whatever other corrective action they might have wanted to see.

Q Are you saying that the fourth quarter losses coupled with the lack of 100 per cent line coverage in your judgment would make it more difficult to maintain this level of $200,000,000 outstanding and that you for those reasons and those factors anticipated this decline of 50 to 100 million?

A Not just the fourth quarter earnings, as I indicated, the 1969 results consolidated and for the transportation company, plus the $125,000,000 write-off, those factors.

Q Was the fact that their coverage was only at 50 per cent level also a factor in your anticipating this run-off?

A They were considerations, that's correct.

Q On February 6th did you attend a meeting at the Recess Club in New York?

A Yes, I did.

Q This is the luncheon that I believe you testified on examination before trial Mr. Levy had arranged, referring to the testimony I brought to your attention this morning?

A I don't believe I testified to that. I think I testified that I am not sure who arranged it.

Q I am referring to your examination before trial testimony rather than testimony here. Tell me, Mr. Bevan as executive vice president and chief financial officer, I take it as such he was the top financial officer of the railroad?

A Yes.

Q And Mr. O'Herron --

A I don't know that that was his title, but the answer is he was the chief financial officer, correct.

Q Is that the way you have him described in your--

A Dave Bevan was the chief financial officer for the transportation company, Penn Central, the holding company, and Pennsylvania company.

Q Executive vice president and chairman of the finance committee?

A Right.

Q And Mr. O'Herron as financial vice president, was he the number 2 financial officer of the Penn Central companies?

A In 1969 and early '70?

Q Yes.

A Yes.

Q And Mr. Loder as treasurer, was he the third, number 3 financial officer or how did he come in?

A I am not sure whether Loder or Shaffer was next in line. It depends on the assignments and areas that they had. I really don't know.

Q One of those two?

A I believe so, yes.

Q You mentioned this morning, I believe, that you learned at that meeting that the railroad is budgeting a $56,000,000 loss for 1970?

A In the transportation company, that is correct.

Q Yes, we are talking about the transportation company.

A Correct.

Q You were also told that beyond that loss of $56,000,000, the transportation company would require an additional $170,000,000 for capital and other expenditures?

A Yes. $100,000,000 for improvements and I think $70,000,000 for equipment.

Q So these were total cash requirements, adding the 170,000,000 and the $56,000,000 projected loss of approximately $226,000,000?

A Correct.

Q At that meeting was there any discussion of bank line coverage? Refresh your recollection, Mr. Wilson, by referring to Exhibit F3, the blue sheet for February 6, 1970.

A Yes, there was.

Q What was that discussion? Tell us what was said as best you can recall.

A I cannot recall the specific discussion other than as it is refreshed in my mind in this last paragraph on the first page of the February 6th memorandum.

Q Is this the language to which you refer, beginning at the bottom of the third page: "We then got into a discussion of commercial paper, and we told them that if they didn't get the $100,000,000 more in lines to bring them up to 100 per cent coverage, we thought their present level of $200,000,000 would run down by 50,000,000 to $100,000,000. We also stressed the importance of their converting the $50,000,000 of commercial paper back-up lines to demand lines."

A That is correct.

Q What was the response of both Bevan and O'Herron to that suggestion?

A Shall I read from this blue sheet? The response follows. "John O'Herron reluctantly said they already have

$10,000,000 of the $50,000,000 on a demand basis but until 'pushing comes to shoving' he really does not want to convert the other $40,000,000 to demand lines."

Q Then continuing, "We said that in the future we do not feel we could inventory as much of the Penn Central as we had in the past and Goldman, Sachs felt that $5,000,000 at any one time would our limit. Both Dave Bevan and John O'Herron responded to our ideas by stating that they did not feel they could get $100,000,000 in bank lines at this time."

Does that complete your recollection on that subject as discussed at that meeting?

A Yes, it does.

Q What reaction did you get to the statement that I read in the middle of that context on bank lines that Goldman, Sachs felt that $5,000,000 at any one time would be "our limit," referring to your inventory of Penn Central notes?

A What was the reaction?

Q Yes. This is the problem that O'Herron had suggested that you and he should kick upstairs to Mr. Levy and Mr. Bevan, and you had both of those gentlemen at this meeting. Can you tell us what was said?

A I don't recall if there was a reaction at that meeting. I think I made the position clear at the luncheon of what we were going to do. I don't recall that there was any discussion of that at that time. I could be wrong, but I don't think so.

Q Did you discuss their cash position at this meeting?

A I don't believe so.

Q But you did discuss their projection of a $56,000,000 loss for the year?

A There were two projections. One was the official one of the transportation company for $56,000,000 and then Dave Bevan indicated a few of the top management had their own separate projection that was more favorable than the official projection. For both the transportation company operating figures and the consolidated figures.

Q You had found out the day before that the prediction that Mr. O'Herron had made for a profitable fourth quarter for '69 back in October had proved erroneous, isn't that so?

A It did not materialize because of two charges, as I remember it, their accountants had recommended that they take after they closed the figures on December 31st.

Q And you learned that his prediction had gone astray from the ticker rather than Mr. O'Herron?

MR. PIERL: I didn't hear you.

Q You learned that his prediction had gone astray from the ticker rather than from Mr. O'Herron?

MR. PIEL: The broad tape, you mean?

MR. STITT: The broad tape, yes.

A I think I testified that I don't recall the fourth quarter earnings being on the ticker tape that afternoon. You showed me testimony when I was deposed that I did remember it at that time. I have nothing further to add to that.

Q Let me ask you this question. Did you have any procedures available to you for verifying the statements as to earnings, etc., made to you by Mr. O'Herron on February 5th and by Mr. O'Herron along with Bevan and Loder on February 6th?

THE COURT: You mean as to the first quarter of 1970?

MR. STITT: Yes, sir.

Q Or the first half, whatever procedures or anything to do with the financial information that you discussed with them or that they brought to your attention on that day.

A I am not sure who you have in mind I would check with. I was talking to the chief financial officer of the railroad that had these numbers assembled. I am at a loss to answer the question.

Q Did you have any procedures available to you for verifying the truth of the statements made to you by O'Herron and Bevan on February 6th?

THE COURT: In other words, Bevan and O'Herron were telling you things orally. Did you have any way of checking on whether they were telling you the truth or not?

THE WITNESS: I suppose that I could have asked them to see all the underlying documents that went into the creation of those figures. If that's a procedure available, yes, I guess we had that.

Q And you could have called their accountants, Peat, Marwick, Mitchell, couldn't you?

A I am not sure that Peat, Marwick, Mitchell got into forecasts.

THE COURT: I don't think they come in in advance. They come in later, don't they?

Q Weren't they in the process of conducting their annualaudit of the railroad and the Penn Central companies' affairs during the --

THE COURT: Wait. Wait. February 6th is after they completed the annual audit of '69. I don't know that Certified Public Accountants come in during the quarter.

MR. STITT: I am referring to their review, your Honor, of the year end figures as of December 31st.

THE COURT: No, you are not. I asked you specifically what you meant by the question, did you mean the first quarter, and you said yes. The year end figures were available for anybody to read, including your client, who read them in the newspaper.

Q Could you have contacted Peat, Marwick, Mitchell to verify any of the information or prospects of the railroad--

THE COURT: I repeat. Do you know of your ability to call the Certified Public Accountant during the quarter to check with them as to prognosticating figures on experience in a month? Are they in a position to give you that information? They don't get paid for that.

MR. STITT: Let me withdraw the question and put it thisway.

Q Mr. Wilson, I asked you this morning about the degree of encumbrance of assets of Penn Central Transportation. Could you have contacted Peat, Marwick, Mitchell to obtain any verification as to the degree of such encumbrance during the period, say, February 5th through March 16, 1970?

A The question is could I: The answer is yes.

Q Was Goldman, Sachs under legal duty to continue selling commercial paper of Penn Central Transportation Company or any legal obligation to do so after February 5, 1970?

THE COURT: I don't know what you mean by that.

MR. PIEL: I was going to have to ask for the question for the same reason.

THE COURT:Did he have a firm contract?

MR.STITT: Yes.

MR. PIEL: I don't understand the question even with your Honor's assistance.

THE COURT: I understand it now. Did he have a firm contract with Penn Central that he had to continue the dale of their commercial paper after February 5th.

A No.

Q Is it true that on February 9th the $10,000,000 by back transaction which you and Mr. O'Herron discussed on February 5th was completed?

A I don't know that for the fact, whether it was the 9th or 10th or whatever. I don't remember.

Q Would you refer to your blue sheet of February 12, 1970, Exhibit F4. I draw your attention to the first two sentences?

A I did not write a blue sheet on the 12th of February.

Q I draw your attention to F4 under date of February 12, 1970, and also your name and your initials in the lower right-hand corner.

A May I apologize to you. It doesn't appear in the credit file. I don't see it.

Q Let me give you my copy.

MR. PIEL: Excuse me. I think it is in the credit file. It is a continuation, written on the second page of the one of February 6th. That's why you didn't see it.

THE WITNESS: I do see it. Excuse me.

(Record read.)

A I still can't tell from this blue sheet of February 12th whether it was on the 9th or the 10th.

MR. PIEL: The calendar shows that the preceding Monday before the 12th was the 9th.

THE WITNESS: Thank you.

Q I draw your attention to this statement, "On Monday they bought back from our position approximately $10,000,000 Penn Central notes and put it in their back-up lines."

Tell us about the mechanics of that, how was that worked out?

A I can only tell you generally. I can't tell you in this specific set of facts.

Q Give me what you can, Mr. Wilson.

A Goldman, Sachs owned in excess of $10,000,000 Penn Central. We took $10,000,000 out of inventory and physically delivered them to Penn Central's bank in New York, I believe Morgan Guaranty, and they took the notes back from our runner and we were paid in federal funds. So we had approximately 10,000,000 in cash and they had 10,000,000 in notes.

Q Do I understand from your blue sheet of February 12th, Exhibit F4 in evidence, that rather than this money coming from the transportation company's treasury, it was supplied by banks through these lines of credit securing the commercial paper?

A It was my understanding from John O'Herron that for him to generate the $10,000,000 to pay Goldman, Sachs to buy back the 10,000,000 Penn Central notes, that he drew down, he borrowed from, the $10,000,000 of these standby lines, had the funds transferred to Morgan Guaranty and Morgan Guaranty paid us when they collected the full $10,000,000, paid us.

Q So that the mathematics would be that as a result of this transaction, the $200,000,000 outstandings of commercial paper could be reduced from 200 to 190 million dollars and the total bank lines of $100,000,000 would now be reduced to 90?

A At the end of that day, if everything else remained constant, that would be correct.

Q So as of that day we have $90,000,000 of lines supporting $190,000,000 in paper?

A I believe that is correct. We have a computer run that shows this.

Q So at that point the line coverage would be slightly below 50 per cent?

A Yes.

Q Exhibit F4 contains this statement in the first sentence: "I talked with John O'Herron several times this week." It's been established that Monday was the 9th, which would make February 12th a Thursday. Would you tell us what you and Mr. O'Herron discussed during the course of those telephone conversations?

A I do not remember.

Q Referring to your blue sheet of March 23, 1970, in evidence for limited purposes, F5, I draw your attention to this language which is the portion that's in evidence: "Regarding the amount of Penn Central Transportation's commercial paper, Goldman, Sachs & Co. is prepared to inventory at any one time his recollection of the February 6th luncheon was that no decision had been reached and that both the 5,000,000 and $10,000,000 figures were still under consideration. I told him that was not my understanding and that in fact Goldman, Sachs & Co. felt that a $5,000,000 ceiling was appropriate until such time as they obtained 100 per cent line coverage, completed some of those long term financings and started to reduce the operating losses."

I ask you whether you discussed any of those subjects with Mr. O'Herron during this week of February 9th through 13th?

A I can't remember. I do not recall.

Q Were you asking him how the operations were going for the first quarter?

A At what point in time?

Q During the week of February 9th?

A I don't remember.

Q Did you discuss with him his cash position?

A I don't remember.

Q Did you discuss with him how he was coming along in obtaining Euro-dollar bank lines?

A Possible, but I don't remember.

Q You testified previously that more and more investors were using as a criteria to buy or not to buy commercial paper whether or not the particular issuer had 100 per cent line coverage. Do you recall that?

A I don't believe that I testified that more and more were adding that as a test.

Q Did you have a discussion with O'Herron as early as September, 1969, and I would refer to that meeting of September 11th, Exhibit F7 in evidence, concerning this particular subject?

A The answer is yes.

Q Is it true that you told O'Herron at that September, 1969, meeting that if the money market got even more right and stringest and more investors moved towards the test of 100 per cent coverage, you would insist that Penn Central get it?

A Do I recall that discussion?

Q Yes.

A Only as it is brought back from my reading of the blue sheet.

Q I am going to call to your attention your testimony at page 1523 of the Welch trial and direct your attention to the statement at the middle of the page. Does that jog your memory on this subject, Mr. Wilson? I will state that it is indicated at other pages, I believe 1,500, that this is the September meeting about which you are being interrogated.

A I said this, and I think it is consistent with what I just said now. I don't recall the exact language.

Q You testified, I believe, on direct examination that following your meeting with Mr. Bevan and Mr. O'Herron that you were under the impression -- strike that. In your discussion with Bevan and O'Herron on February 6th and their mention of the overall $56,000,000 projected loss for the year 1970, that you were under the impression that these losses would continue through the first quarter of 1970?

A Yes, I believe I did testify to that.

Q And do I also understand your testimony to be that Bevan had indicated that he expected the fourth quarter to be in the blank for 1970?

A I don't believe I testified to that.

Q Did you indicate that you felt that these losses would be centered in the first three-quarters of the year with the first quarter taking the lion's share of the loss?

A I don't recall testifying quarter by quarter what he told me, no.

Q I am asking you what you concluded. Did you anticipate a poor result for the first quarter of 1970?

A Excuse me. Are you asking me at the time of the luncheon what my expectation was?

Q At the time of the luncheon or at any time up through Monday, March 16, 1970, did you anticipate from what you had learned from Bevan and O'Herron at the meeting on February 6th or perhaps thereafter from these gentlemen that there was going to be a poor result for the first quarter of 1970?

A Yes, I did.

Q What sort of dollar range were you figuring on in your judgment at that time?

A I did not pick a dollar amount or range in my mind. Probably larger than what it was in the first quarter of '69 because of the snow and the conditions at the time, but within that area. But I didn't have a number in mind that I can remember.

Q You were asked, I believe, on direct examination concerning your reasons or your theories for the failure of the Pennsylvania company's. $100,000,000 debenture offering which had been scheduled for May,1970, do you recall that testimony?

A Yes.

Q Were you present in court Monday when Mr. Sullivan gave testimony on this subject?

A I think part of the time, yes.

Q Do you recall his mention of the announcement of the first quarter earnings on or about April 23, 1970?

A I do not recall it specifically, no.

Q Do you recall his testimony about the run-off of Penn Central Transportation Company following that date, April 23rd?

MR. PIEL: I will have to question that, your Honor. I have no recollection of his testifying about a run-off.

THE COURT: Do you have anything specific in mind, Mr. Stitt?

Q Were you present yesterday when Mr. Lepley testified on this subject as to the run-off of Penn Central commercial paper following April 23, 1970?

A I don't recall that. I thought most of the time had to do with his work sheets in the January, February, March area.

Q Do you recall his testimony about the volume or shoul I say lack of volume of sales after April 23rd?

A I don't recall that specifically, no.

THE COURT: This is Lepley's testimony?

MR. STITT: Mr. Lepley.

THE COURT: On cross-examination by you?

MR. STITT: Yes, sir.

THE COURT: Mr. Lepley testified on cross-examination that after the Penn Central first quarter losses published on April 23rd there were only three sales of Penn Central's commercial paper after May 1st.

MR. STITT: I believe that is his testimony.

Q I take it you don't recall that, Mr. Wilson?

A This refreshes my recollection that he counted some trades, whether they were three or four or whatever.

Q You testified this morning that you were a reader of the New York Times and the Wall Street Journal. I show you Defendants' Exhibit EH for identification, a clipping under date of April 23, 1970, and ask you if that came to your attention at or about that date?

A Yes, it did.

Q I ask you, does that clipping refer to the first quarter results of Penn Central Transportation?

A Yes, it refers -- the first paragraph talks about the Penn Central company's financial position worst in the first quarter. It talks about the holding company.

Q Do you find a reference to the losses of the transportation company, the issuer of the commercial paper, for the first quarter?

A Yes. Down the article it says "The Penn Central Transportation Company, which operates the railroad properties of the former Pennsylvania-New York Central, had a first quarter net loss of $62,709,000."

Q And but for an intercompany transaction involving Clearfield Coal it would have been close to $80,000,000?

A The next sentence says "The loss would have been nearly $80,000,000 except for an intercompany transaction."

Q What was the operating loss for the first quarter of '69? I refer you to the end of that article.

A The first quarter loss in consolidated--

Q For the transportation company.

A The top of the next column. "In the first quarter of 1969 the transportation company reported a net loss of $12,764,000."

Q I ask you, was there a run-off of Penn Central Transportation commercial paper following the publication of these figures which you have just given us on April 23, 1970?

A Yes, there was. I am not sure when it started, but it was after this news came out, that is correct.

Q Do you have any opinion or did you make any judgment at the time as to whether there was any relationship between the figures which you have just given us and the subsequent run-off?

A It is very hard for me to give an opinion as to the causal relationships of each investor that had been buying Penn Central as to why they decided not to roll it over, whether it was this news, whether it was the financial conditions in the market at the time, whether it was the railroad industry, or whatever. Whether it was line coverage, I just don't know. I can't answer that question.

Q Is it true that the announcement of these losses was a factor in that run-off?

A In my judgment?

Q Yes.

A Yes.

Q How far did that run-off go, Mr. Wilson?

A I believe the dollar amount of commercial paper outstanding at the time of the reorganization was either 82,000,000 or $87,000,000.

Q That was after some 96.5 million dollars of bank lines had been exhausted?

A Yes.

THE COURT: How much?

MR. STITT: 96.5 million dollars. Your Honor will recall Mr. Lepley's testimony yesterday.

THE COURT: That is the 46.5 and the 50.

MR. STITT: Right.

Q Is ir true that the railroad's inability to meet these commercial paper maturities was a factor in the bankruptcy petition which followed on June 21st?

MR. PIEL: Objection, your Honor.

THE COURT: Sustained.

MR. STITT: Your Honor, that completes my examination.

THE COURT: Redirect?

MR. PIEL: This will be very short, your Honor.

REDIRECT EXAMINATION

BY MR. PIEL:

Q Mr. Wilson, I believe you testified that you did not personally check details of encumbrances to identify particular properties that were or were not under encumbrances, but it was Mr. Vogel's job to do that. I asked you on --

MR. STITT: Did the witness answer the question?

THE WITNESS: I didn't know it was a question.

MR. PIEL: It was preliminary to my question. I think I am correctly stating what I heard here before, Mr. Stitt.

Q Was there any reason for you at any time in early 1970 to go to Peat, Marwick, Mitchell, the Certified Public Accountants for the railroad that had certified the 1969 financial statements to ask them about the extent of encumbrances?

MR. STITT: If your Honor please, I object to this question as calling for a conclusion from the witness.

THE COURT: How else do you find out why he didn't do it? You brought out he didn't do it. Isn't he entitled to say why he didn't do it?

Q Tell us why, Mr. Wilson.

A If I personally had been the one that was going to check this, I would have called Dave Bevan or John O'Herron.

In my experience in this commercial paper market, I just don't think in terms of calling the accountants to check documents about encumbrances. If I wanted an opinion, I think I would have asked counsel, either an opinion from their counsel or from our counsel, to read the documents and tell me what was encumbered. I very much doubt that I would have gone to Peat, Marwick.

Q There has been testimony here about a document file kept at Goldman, Sachs containing copies of instruments giving rise to encumbrances, is that correct?

A That is correct.

Q Had you seen the December, 1969, offering circular?

A Yes. For the $50,000,000.

Q You will just identify what we are talking about by telling us the sub number.

A It says A12.

Q That is item 12 in Exhibit A. That was in your credit file?

A Yes.

Q You had examined it?

A Yes.

Q Does page 7 contain a tabulation of the properties of Pennsylvania company that are not subject to encumbrances?

A Yes.

THE COURT: What's the date of that?

THE WITNESS: December 16, 1969.

MR. PIEL: Your Honor, May I hand up a copy of this document?

Q You told Mr. Stitt that you did not ask Mr. Bevan and Mr. O'Herron to produce documentation to prove that they were telling you the truth. You said you could have asked.

A Correct.

Q Did you see any reason for asking Bevan and O'Herron for documentation?

A No.

Q Why?

A I was talking to the chief financial officer of the company, of this railroad, and he was telling me what his plans were and what his forecast showed. I am not sure who I would go to to ask him to verify it. If I didn't believe him, I wouldn't have been handling the paper.

Q You did tell us that it was an important part of your own evaluation in the decision to take on a company what you thought of the management as to ability and integrity, didn't you?

A Yes.

Q And if Mr. Bevan and O'Herron had been lying to you and you had asked for documentation, what kind of documentation do you think you would get?

MR. STITT: I object to the form of that question.

THE COURT: Overruled.

A If he was going to lie to me across lunch, I am sure he would have -- and wanted to sustain his position, I would have gotten numbers that were funny also.

MR. PIEL: That is all, your Honor, thank you.

RECROSS EXAMINATION

BY MR. STITT:

Q Mr. Stitt, did you give this testimony at page 1910 of the Welch trial:

"Q If following the meeting on February 6, 1970, with Mr. Bevan and Mr. O'Herron you had undertaken to check up on things that they told you were so, how would you do it?

"Mr.Pollack: Objection, your Honor.

"The Court: Sustained. He may be asked, however, if he had any procedures available to him for verifying the truth of the statements made to him by officers and directors of issuers at that time. The answer is yes or no. Did you?

"The Witness: I could have called their accountants, I could have."

Did you give that testimony?

A Yes, I guess I did.

MR. STITT: Thank you.

THE COURT: I don't know what that has to do with it. He already said he could do that. You are adding nothing, Mr. Stitt, by that.

MR. STITT: I thought counsel was in the process of talking him out of it, your Honor.

THE COURT: He was talking about who you call. He is speaking to the chief financial officer. He said "I could have called the accountant if I wanaed to," but he is speaking to the chief financial officer.

MR. STITT: I thought his testimony was not quite as strong as that, your Honor, on redirect.

THE COURT: You don't think his testimony is that strong? I do. Go ahead.

MR. STITT: Referring to the redirect, your Honor.

MR. PIEL: I would just like to say that there was an interruption of the witness' answer and he went on to say, "I could have gone and asked for the underlying documents to these projections, and so on, but I didn't feel this was necessary."

MR. STITT: Whereupon the court struck "I didn't feel it was necessary."

THE COURT: I am letting it in. You may step down.

(Witness excused.)

THE COURT: Any more witnesses?

MR. PIEL: I have no more witnesses, your Honor, except those who testify in absentia by deposition. We offer in evidence those portions of the testimony of David Bevan --

THE COURT: Pardon me. Hasn't that already been done through your pre-trial order?

MR. PIEL: No, it was suspended in order to permit Mr. Stitt to counter designate.

MR. STITT: If I may make a statement on that, your Honor, Mr. Bevan was originally designated in the pre-trial order as a live witness to be called --

THE COURT: No. But they told you they weren't going to bring him. So you asked until Friday or Monday to designate.

MR. STITT: Right. There have been two difficulties. First, to my knowledge, please correct me if I am wrong, Mr.Piel, the defendants have not provided us with the copy of Mr. Bevan's designations bearing corrections to his testimony as well as the testimony as originally given, and until we have that we will not be in a position to put in our counter designations which we certainly do want to bring to your Honor's attention. Second, there is a dispute between the parties as to whether or not the plaintff will be permitted, as I thought had been approved and agreed, but I may be wrong, that we would be permitted to designate portions in addition to the deposition, portions of his trial testimony in the Welch case. I have perhaps not more than five pages in all that I would like to add to my designations, and I believe it is fair that we be given this opportunity because the representation had been made that Mr. Bevan would be called, I would be here, and if he had been I wouldhave been able to use the Welch material to cross-examine him.

THE COURT: But you were told a week ago that he wasn't coming.

MR. STITT: Yes, sir, but I also felt that I would be able to designate portions of his trial testimony. Since last Friday there has been a dispute that's developed on that part.

MR. PIEL: No dispute developed. There has never been an understanding that he could use it, except possibly to impeach the witness, and it could never be received for the truth of the matter asserted therein if it were being used for impeachment. A deposition was taken in this case on issues between us, this plaintiff. The plaintiff was not a party to the other proceeding and the issues were different. I think it is proper to proceed on the deposition that was taken here.

THE COURT: I think you are right.

MR. STITT: Your Honor, I would suggest that there is no real difference between a deposition pre-trial in the consolidated discovery proceedings and testimony which this man gave as a witness I believe called by my adversary in the Welch case where there was opportunity for direct and cross-examination. As I say, it is only five pages. Your Honor may choose to disregard this testimony. I think it would be of assistance to the court and the portions that I would designate are only four or five pages in total.

THE COURT: Mr. Piel's objection, I gather, is not based on the four or five pages. It is based on a statement that was made before me a week ago in which the only thing mentioned to me was designating pages of the deposition. You made no mention at all of the Welch trial.

MR. STITT: I don't know whether I did in the first day of the trial. I didn't last week. I have a recollection I may have on the first day, but, your Honor, I can't state that for a fact.

THE COURT: I will take the designations on the deposition.

MR. PIEL: If your Honor please, Mr. Stitt has not yet given us his counter designations --

MR. STITT: I explained that.

THE COURT: He says because you haven't given him the corrected deposition.

MR. PIEL: We had to get the corrected deposition from Mr. Stitt. He had it --

MR. STITT: The copy I had I obtained from the Pollack firm and it had all sorts of delineations and comments in the margin. I knew that would be unsatisfactory to everyone.

MR. PIEL: There is no problem about this. With your Honor's indulgence, we will give Mr. Stitt an opportunity to present us with his designations. We will see that they are marginally ruled in your Honor's copy so you will have them both with a colored crayon that tells you who is doing it, and at that time we ask leave to indicate any portions that we may feel we have to object to, just as we have done on the others.

THE COURT: Why don't we postpone until next Monday the submission of the Bevan deposition, correct the corrected copy with the designations by both sides. All right?

MR. PIEL: Yes.

MR. STITT: Thank you, your Honor.

MR. PIEL: That is fine, your Honor.

THE COURT: What is the next problem?

MR. PIEL: The next thing is that -- I hope it is not a problem -- I am offering the deposition of John E. Corrigan, the officer responsible for loans to transportation and utility companies by First National Bank of Chicago, which was the main bank on the standby and swing line business and who -- your Honor has heard about it. I would like to call your attention to the bank checking in the credit file which is item A76. It is shorte. If I may, "On December 3, 1969" --

MR. STITT: This part of the designation is?

MR. PIEL: Oh, yes.

MR. STITT: Was that marked an exhibit to his deposition?

MR. PIEL: No.

THE COURT: This is part of Exhibit A that's in evidence here.

MR. STITT: I see.

MR. PIEL: I am only calling the court's attention--

MR. STITT: I'm sorry, I apologize.

MR. PIEL: -- as being context for the deposition that I am offering, that the credit file contains a reference to the bank checks so-called made by Goldman, Sachs on December 3, 1969, in which they were advised by First National Bank of Chicago, "We have a $15,000,000 participation in a 300,000,000 revolving credit agreement, convertible in January of 1971 to a five-year term loan expiring January 1, 1976. We also accommodate the subject with a $5,000,000 line for unsecured borrowings, and we have other commitments totaling close to $17,700,000."

Then it says "From an earlier letter, June 23, 1969, from this bank, we have had a valued account from the subject dating back for 45 years. The line for 5,000,000 was last approved in July of 1969. Proper use has been made of our accommodations. We continue to hold the company and its management in high regard and we are pleased to continue our cooperation," which they did until they acquired a claim in the reorganized proceeding. I submit portions of the deposition of John E. Corrigan to the extent designated in our pre-trial order designations.

MR. STITT: I take it, and I am sure it does, that this copy has the designations of the plaintiff. I see them in our blue pencil, and there is no problem about this being received, your Honor. The man is out in Chicago and of course beyond the 100 mile limit.

MR. PIEL: Blue for plaintiff, green for defendant, red for objections. If your Honor please, based on your Honor's rulings during the course of the trial, certain additional portions of the deposition testimony designated by plaintiff should be stricken from the record of this case. We are respectfully submitting based on your Honor's rulings some additional requests for rulings on objection to the deposition testimony submitted to you. May I hand that up to the court?

THE COURT: Yes.

MR. STITT: If your Honor please, to my knowledge, this was just delivered to us this morning. My suggestion would be that I have until Monday, the date previously set by the court for the submission of the Bevan designations, to prepare any response that I might deem appropriate to this document.

THE COURT: All right.

MR. PIEL: No objection to that. I submit this as a supplement to the pre-trial order. With Mr. Stitt's kind consent, I am submitting a memorandum that I suggest we mark as Exhibit CU-1 which simply gives an explanation of a code that appears in the computer run which is in evidence as Plaintiff's Exhibit F93 and which has also been referred to as Defendants' Exhibit CU.

MR. STITT: Your Honor, it has been represented to me that a representative of Goldman, Sachs, if called, would testify as to the explanation set forth in this memorandum. I accept that representation and have no objection.

xx (Defendants' Exhibit CU-1 received in evidence.)

MR. PIEL: Your Honor received in evidence but subject to connection by plaintiffs proof two other documents besides 76, 77 and 78, namely F72 and F73, which are internal communications in the Pennsylvania Railroad Company between David Bevan and Chairman Saunders. I think your Honor observed at the time that it was the kind of thing that was dragged up in a dragnet subpoena, obviously not the kind of stuff that goes outside a business organization, but the difference between documents of the kind that I discovered only by dragnet subpoena and those which could reasonably be discovered by businessmen in the conduct of their ordinary affairs I think is plain, and there has been a failure of any proof therefore to connect, and I therefore respectfully renew the motion to strike those two exhibits.

MR. STITT: May I be heard, your Honor?

THE COURT: Let me read it first. I don't know what you are talking about.

(Pause)

MR. STITT: Your Honor, these documents, 73 sort of goes with 72, we submit are examples of the kind of information that Goldman, Sachs could have obtained about the liquidity crisis, if I may use that term, of the Penn Central Transportation Company or then Penn Central at or about September 11, 1969, when Mr. Wilson was meeting with Mr. O'Herron in New York and at which meeting, as demonstrated by Exhibit F22, he had intended to speak with Mr. O'Herron about such things as cash flow, how the merger was going along, etc. At this meeting of September 11th Mr. O'Herron told Mr. Wilson that the company's cash position for the first half of 1970 was going to be very tight. I believe it is a fair inference from the testimony that Mr. Wilson really didn't pursue these statements that Mr. O'Herron made at that meeting, he didn't ask how tight, he didn't call for cash projections, he didn't call for figures, and I suggest that if Goldman, Sachs had pursued their planned inquiry at this meeting of September 11th or thereafter that this is the kind of information that they could have obtained. Perhaps not in the form of these two documents, but these are examples of what an inquiry would have revealed if what we contend a first class credit inquiry or first class inquiry had been made into the financial affairs and condition of financial muscle of thiscompany at that time. For that reason we do suggest that a tie-in has been made in this record. There are undoubtedly others, but this is the only one that I can think of at this time after an eight-day trial. I am sure there are others in the depositions, I am sure that Mr. Vogel, for example, was interrogated by me as to what questions he was putting to the railroad representatives at that time. He attended this meeting on September 11th. We have Lepley's testimony that he has no idea of any credit investigation having gone on in 1969 and 1970. We say that certainly by the time Franklin's note was sold to us in March of 1970, that Goldman, Sachs had warning after warning after warning that placed them under an obligation to make an inquiry, to make an investigation, and that this is the kind of information they would have received. I believe the testimony is that whenever they did ask for information from the railroad there isn't a single occasion on which that information, whether it was oral or documentary was refused.

I do believe that there has been abundant connection here. The weight that your Honor gives to this material is, of course, something entirely different. But I do suggest that it should remain in the record and that it should not be taken out of the record at this time.

MR. PIEL: If your Honor please, it is Mr. Stitt's position that there were certain facts of great significance that existed that Goldman, Sachs didn't discover and with the exercise of reasonable care could and should have discovered. I submit, number 1, they would never be able to get this kind of a top level urging from one top officer to the other who is making the case for some steps to be taken. It is a letter. It is then forwarded by the chairman to the president, marked "Personal" with a copy to Mr. Flannery, the head of operations, marked "Personal." It is not the kind of a shopbook type of record, it is a personal communication of opinion. Therefore, it would never be revealed to them. If there are facts in here or facts are alluded to in this letter that Mr. Stitt claims existed that we might have found out, then he should prove that the facts existed, not that somebody was expressing an opinion. The letter is incompetent for that purpose. Mr. Saunders' deposition was taken, Mr. Bevan's deposition was taken in these consolidated proceedings, and the proof of the facts that he claims we ought to know should be done according to proper rules of evidence so that we have an opportunity to cross-examine the alleged source of proof of facts. I therefore feel that these two documents should not be admitted.

MR. STITT: If your Honor please, if I might have one additional word, there has been abundant testimony here of some very close and long standing relationships between partners of Goldman, Sachs--

THE COURT: I tell you, the mere fact that you know nine directors or five directors does not prove that point. In fact, I would assume that some directors didn't know this information that was included in the September 10th memorandum. So the fact that you knew a director does not mean that you therefore had access to this document--

MR. STITT: Certainly Saunders, Bevan and Perlman all had knowledge of the material set forth in this document, and Mr. Levy, for example, just right off the top of my head, testified that he knew personally I believe all three of those men.

THE COURT: The fact that he knew them personally, what does that mean? I know you personally now after eight days.

MR. STITT: Also Mr. Bevan testified at his deposition page 109 and 110 before he corrected it that "If Gus raised some question on something like that, I would get it." Then he changed his answer to say that "I would answer to the best of my ability." There isn't a single occasion which Goldman, Sachs requested information of Penn Central as far as this record goes where they were refused that information. They always had the option to stop selling this paper if they didn't think they were getting the type of cooperation that they wanted. So they had the ultimate weapon here --

THE COURT: Objection sustained.

MR. PIEL: If your Honor please, the defendant rests. I might make a comment or two in closing before we submit the matter to your Honor.

THE COURT: Wait, you rest. Do you rest?

MR. STITT: Subject to the designations from the Becan deposition, your Honor, the plaintiff has nothing further.

THE COURT: Do you want to now have argument on your motions or do you want to put that over until tomorrow morning? All motions.

MR. PIEL: We will be happy to put it over until the morning and I think that would be better.

THE COURT: 10:30.

MR. PIEL: May I hand up to your Honor the latest word from on high on the subject of the securities laws and how we ought to read them. It was a decision of the Supreme Court that was handed down this week in Blue Chip v. Manor Drug stores having to do with with the extent to which causes of action ought to be employed under the 1934 Act. Although it is not squarely in point with this case it is an announcement of judicial policy with regard to the enforcement of the securities laws that I think marks a happy, sensible and overdue change in the swing of the pendulum away from some of these recent cases that have tended to make the people that work in this marketplace a few blocks away down here providing the sinews for American enterprise in the way of capital formation and the like guarantors of everything they do. I think the Supreme Court here takes a more moderate tack on that subject and your Honor would be interested generally in this opinion if you hadn't had a chance to see it yet.

THE COURT: I don't need that. Is it in U.S. Law Week?

MR. PIEL: United States Law Week, your Honor, for June 10, 1975.

THE COURT: I have it upstairs. See you tomorrow at 10:30.

(Adjourned to June 12, 1975, at 10:30 A.M.)

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FRANKLIN SAVINGS BANK OF NEW YORK
-against-
GUSTAVE L. LEVY, et al.

June 12, 1975,
10:30 A.M.

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MR. PIEL: If your Honor please, defendant at this time renews its motion to dismiss the complaint on jurisdictional grounds. Alternatively, we move for judgment dismissing the complaint for failure of proof; alternatively for judgment for defendant on the weight of the evidence. With your Honor's permission, my partner Michael Maney will address the motion relating to jurisdiction. He has a better command of the precedents than I do. Then when your Honor has heard counsel on those motions, with the court's permission, I would like to take a few minutes to talk about the merits, realizing that when it comes to the merits a lot of the proof here has been brought here, so to speak, in a wheelbarrow instead of being presented across the witness stand, and your Honor would want to review the evidence to make sure whether or not there is anything in that wheelbarrow that deserves your Honor's attention. I suppose in that connection briefs of counsel articulating what they claim has been proved by the record now before your Honor and citing the record with particularity would be helpful in focusing and narrowing that search. However, a few remarks at this time, your Honor, with regard to a point of view and perspective on the case might be of assistance to the court in reviewing the evidence. Mr. Maney.

MR. MANEY: If it please the Court, your Honor I will assume general familiarity with the trial briefs and try to keep these comments limited to what I think is --

THE COURT: Also familiarity with Judge Brieant's decision.

MR. MANEY: Your Honor, taking first the issue of Section 12(2) of the Securities Act of 1933, it is the defendants' position that no use of an instrumentality in interstate commerce or of the mails was used in the offer or sale of the commercial paper here involved. I think the evidence at trial substantially is as we recounted in defendants' trial memorandum on jurisdictional points, namely that the offer and sale was effected by a telephone conversation within the City of New York. Following Judge Brieant's opinion that --

THE COURT: Forget the telephone conversation. It is not involved. It is the mail.

MR. MANEY: The only question really is one of the use of the mails. It is our position that Judge Brieant, without really evidence from that record, but even if were on this record, he construed the mailing of the confirmation, so-called, as a necessary step for the accountants at Welch Foods in upstate New York to receive before they could book the transaction on the books and records of Welch Foods. We think that that is -- we won't fight that case again, but on this record --

THE COURT: You had that opportunity.

MR. MANEY: On this record, what is clear is that the very day that Mr. Bock ordered the paper, a sales invoice, Exhibit PQ in evidence, was delivered with the note to the Chemical Bank for the account of Franklin Savings, that payment was made, and that that sales invoice contained all of the information necessary for Franklin. It was hand delivered. Mr. Bock's own testimony on this point was that as he was dealing with federal funds, that as soon as he ordered the note and made up his own sales ticket, he instructed his comptroller to record the transaction on the books of account of Franklin Savings Bank and to debit their checking account for federal funds of that amount. What we have here by plaintiff's own testimony is a transaction which was fully recorded without any reliance on any documents put in the mails. We anticipate that the plaintiff will argue that the mailing was necessary for purposes of having some record in the files of the bank so that examiners from the New York State Banking Department, in reviewing the portfolio, would have the necessary documentation. While that may be a reason which as a courtesy has had commercial paper dealers mail out these documents after the fact, it is not and was not an integral part of this sale, and we feel that it was even further removed from the transaction than Judge Brieant's comment that the transaction between Philadelphia and Goldman, Sachs was on the other side. What we have here is an examination by a banking department official over a month after the event to review just some documentation on the transaction. That documentation could have been obtained very easily by Mr. Bock from the Moody's manuals, Standard & Poor's manuals, the other documents available at the bank or from other documents available through the public press; that this was a courtesy provided by Goldman, Sachs not to either lull plaintiff into taking no action or to otherwise induce the plaintiff to not protest this transaction.

We believe that the cases relied on which dealt with mail fraud cases always involved a situation where there was a scheme of which the mailing was an integral part, even though it may have occurred after the fact. Here we have an isolated transaction that really is not an integral part of this sale. It is on that basis that we would urge that the claims under Section 12(2) whichwe admit is a section of the law which would on its face colorably cover the kind of transaction involved here, fails because of the lack of a jurisdictional basis. I say it putatively covers it because I believe that the Supreme Court last Monday in the Blue Chip case made more than one reference to the necessity for construing the Securities Acts of 1933 and 1934 as an integrated whole and questioned rather seriously whether implied rights of action should be created by the courts to cover situations where there is an express private remedy available and enacted by the Congress.

It is our position that where, as here, there is a colorable claim to a right of action under Section 12(2), because you did have a purchaser and seller dealing as principals, and not every element we claim was met on that case,but then we don't feel that the question of implied rights of actions determines on whether the plaintiff can be successful, but in the situation such as that there is no need to imply a right of action under sections of the law which on their face were construed to permit the SEC to bring enforcement proceedings. We think that such a section is Section 17A of the Securities Act of 1933 which starts off, "It shall be unlawful," and quite clearly on its face was enacted to permit the Securities and Exchange Commission to bring injunctive proceedings to prohibit violations of the Act. I think that as far as Section 17 is concerned, we can rely on Judge Brieant's opinion which in turn was relying on Judge Gignoux's opinion in the Dyer case.

THE COURT: Wait, wait, you are skipping. You are skipping Ratheon, a Second Circuit case. Judge Frank said it did apply to a civil right of action. You just can't say Judge Brieant is right by brushing off -- saying he relied on Judge Gignoux. Both great judges, Brieant and Gignoux, but Judge Frank in the Raytheon case specifically sai that 17A applied and Judge Gignoux admits that he so said, if you read the full quotation in Judge Brieant's opinion from Judge Gignoux's case. You can't brush it off that easy. I admit the Second Circuit said it is open here because Judge Frank's statement appears in a footnote, but he specifically said in the footnote that 17A applies. Judge Brieant isn't 1,000 per cent right in that area.

I may follow him, but you can't brush him aside as easily as you tried to brush him aside.

MR. MANEY: I forgot, your Honor, I took the liberty of brushing Raytheon aside as Judge Friendly did in Texas Gulf Sulphur. I think the question under Section 17 has only come up in a case where there was a 10B5 claim--

THE COURT: There was a fraud claim as opposed to lhh7

negligence? That's a distinction I think Judge Friendly made.

MR. MANEY: There really seemed to be little point in debating the issue under Section 17 if there was already a claim under 10B.

THE COURT: That's what the courts normally have done. If you have got the defendant on 10B, why bother with 17A.

MR. MANEY: I think the issue came up once before in this circuit in Superintendent of Insurance, Bankers Life, Judge Herlands addressed it in the District Court decision, but that never reached the Court of Appeals or the Supreme Court, where there you were dealing with certificates of deposit. It is our position that first there should be no private right of action under 17; second, that one could dispose of 17 on the same intrastate basis, Section 12(2), although it may not be necessary to rely on that distinction, but, finally, to the extent that if the court were to conclude contrary to our claim that there is a claim under 12(2), I could see no possible way under the facts of this case where the plaintiff could lose under 12(2) and not necessarily lose under 17 or there would be no reason to go on to Section 17 if you win under 12(2). I think in a sense it may be academic.

THE COURT: That's possible.

MR. MANEY: It is reached only if they won under 12(2). I think the question of whether an action should be implied is a point reached, and I am quoting from page 4711 of U.S. Law Week in the Blue Chip decision, where Justice Rehnquist writing for the court said "It would indeed be anomalous to impute to the Congress an intention to expand plaintiff class for a judicially implied cause of action beyond the bounds delineated for comparable express causes of action."

We think that 17 to the extent it may exist would be either coextensive with Section 12 or should not be read as creating an implied right of action, where a plaintiff has a colorable claim under a provision that does confer an express right of action.

Finally return to the Securities and Exchange Act of 1934 and recognizing that notwithstanding the language of Section 3A10, the court is bound by the decision in Zeller v.Bogue, we do think that what Judge Friendly was addressing in that case was to deal with a generic class of notes that would be interpreted as outside of the scope of the Securities and Exchange Act. Again I go back to rather timely remarks by the Supreme Court. At page 4716 of U.S. Law Week, the court contrasted the 1934 Act which "is general in scope but chiefly concerned with the regulation of possible distribution trading on the nation's stock exchanges and securities trading markets," contrasting that with the Securities Act of 1933 which deals with usually initial offerings of securities, and we believe that the Congress was well aware of the fact that in the commercial paper markets generally you are dealing with what would in a stock case be considered an underwriting distribution, purchasing in a primary market from the issuer, reselling by a dealer, that that is not the kind of transaction which requires regulation under the Securities and Exact Act which deals with usually this after market transaction, that that was intended by the Congress by exempting these notes, and certainly if one is to read in some kind ofrelationship between the note excluded from the Exchange Act and the notes which would be exempt from registration under the Securities Act, that it is the generic class that most businessmen would consider as commercial paper.

I think a reference to the facts of Zeller highlights this. In Zeller what you had was a demand note issued by a parent to a subsidiary corporation, certainly not the kind of documents that anyone would reasonably call commercial paper. The same is true in the Sanders v. Nuveen case. That was small notes sold to a lot of individuals, not notes that were being offered as commercial paper to some of the largest and most sophisticated financial institutions in the country by the leading dealer of commercial paper in the country, as we have in this case. Here we have what any reasonable person would have called until the reorganization when you talk to a lawyer commercial paper by any normal definition. We think that it does fit the type of security which Judge Friendly said, his words, in the Zeller case, and it does not require analyzing what we think is a double two-pronged test under the SEC release or even a four-prong test.

The basic question is is this the kind of instrument that was normally dealt with as commercial paper. Under that test the Penn Central commercial paper would have been excluded from the definition of "security." Even if you fall back to the question of does it meet the specific tests, we think that the question of prime quality being dependent on whether it went into bankruptcy or not is unfortunate reasoning in the Welch opinion, because that would mean that under normal circumstances you don't have another exemption --

THE COURT: You mean you are charged with hindsight?

MR. MANEY: Here we had an exemption under 3A6 because it was ICC approved. If you didn't have that in a normal case, you were relying on the 3A3 exemption, and a company were to go into bankruptcy, then retroactively it was not exempt from registration and a plaintiff wouldn't have to do anything but sue under 12(1) and say "You offered me a security" --

THE COURT: I was merely referring to Judge Brieant's comments in that regard, and I think what he was talking about at that time was, was it really prime, could it have been prime if it went into reorganization. This is his viewpoint. Not merely the fact that you went in, therefore you were not prime. This is a factor to be taken into consideration in determining whether it was prime at the time, could these events have developed so rapidly that you were not aware of them or should have been aware of them. I think that's the area he was talking about. I don't think he made the flat statement that if you go into bankruptcy, it is like the four-month rule in bankruptcy, if you go into bankruptcy and in three months it follows you are not prime paper. I don't think he meant that.

MR. MANEY: Your Honor, what we are dealing with here was notes of a company which on the day it went into reorganization had a net worth of almost three billion dollars, which was a household name, which was instantly recognized by almost every investor consider the purchase of commercial paper,which was one of the largest corporations in the country, and that under the language used in the various congressional committee reports and debates, when they are talking about prime quality, they are talking about some company who by its size, by stability, can offer its own debit directly to investors, and in a way, I think this dovetails with the notion of not offering it to the general public, it is very similar to the types of analysis used on the private placement of securities, that you are dealing here with a market that is capable of protecting itself. You are dealing here with investors who are capable of performing their own analysis, that they can deal with companies of a stature of Penn Central, not an unknown closed corporation or a family company, they can go to a Moody's transportation manual and get twice a week the most current financial information on the company.

They are dealing with a corporation of six billion dollars in total assets and with current liquid assets that could be brought to bear, and that goes into the question of current transactions issue too, but essentially what we are dealing with is not a general public. In spite of the facts that banks may have purchased for their own customers, that is the bank's responsibility, and a review of the investors in commercial paper as reflected

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in the master computer run shows that here was a professional market, both on the selling side and on the purchasing side, and that these were the kinds of notes that were treated as prime quality by those who invested in it, including Mr. Bock, that they were purchased by professional investors, not the general public, that certainly it was the kind of note that could have been discounted at the Federal Reserve, had anyone chosen to do so, and certainly Franklin Savings could have done so, and that --

THE COURT: There is no proof in the record to that effect.

MR. MANEY: There is no proof that it was not discounted, I believe, your Honor. The only issue is whether it is of a type. We think that the legislative history as set forth in the jurisdictional memorandum, including no action letters with respect to certain notes which would not technically meet that test, establishes that -- really it is not an independent test, that this type of paper would be discountable at the Federal Reserve, and finally the question of financial transactions. I don't think Judge Friendly in Zeller was saying that you had to meet all of these tests, as long as it was a note of the kind that would be normally considered to meet these tests. But even looking at it this way, we have in the record only the hearsay comments as the court has limited the exhibits, of Penn Central applying to the Interstate Commerce Commission and identifying what they wanted to do with the proceeds, the ICC making a comment in its opinion, and absolutely no way of tracing the specific dollars, which is a general problem in this market. It was for that reason that in our memorandum we referred to no action letters and attached them and called the court's attention to Exhibit I, particularly, in our jurisdictional memorandum. Where you have a corporation that does need money and that is issuing commercial paper because it needs money, that it is an impossibility to trace the dollars to particular uses. If it is used for a current purpose, then you don't need to use that money for other long term purposes. When you are dealing with working capital, and there was testimony here that that was what Penn Central was going to use its proceeds for, working capital, and working capital is current, current assets, current liabilities, that you would apply the test that was accepted by the SEC, the very body that had promulgated this release that has the four-prong test, to say can you just match some current assets against the amount of paper outstanding. The test used for utilities, which I think that the railroad is somewhat similar to, it never really has to meet the test because it has its own exemption, and there is no question here that the people at Goldman, Sachs were not specifically trying to meet a current transactions test. They did have an ICC exemption, they didn't have to worry about Section 3A3 exemptions, but, nevertheless, the SEC has accepted the proposition that if your accounts receivable plus fuel and tax and utilities exceed the amount of paper outstanding, you have met the current transactions test. If that's the test for a Con Edison or another utility, we think that the same test could be accepted, not in a specific question of is this exempt under 3A3, but is this the kind of note that would be considered under the general definition of commercial paper.

The record does not establish that the accounts receivable for Penn Central at all times were well in excess of the maximum amount of paper that was ever outstanding. On that basis, even if a current transactions test were required, and we don't believe it is, that Penn Central would have met that test. We are not urging, as has been suggested, that that was done or considered at the time. What was considered at the time by the people at Goldman, Sachs was,was it exempt from registration, and the answer is yes, under Section 3A6, as proved by the Interstate Commerce Commission. They felt, erroneously, they had to keep it nine months, although that was not required by the

ICC rules, that it was the kind of note that would be deemed to be commercial paper, and at that time in 1970, reading the Securities and Exchange Act of 1934, having a note that had a maturity of less than nine months, it was not within the Securities and Exchange Act of 1934, for their purposes in terms of the question of whether certain confirmations had to be prepared and sent out with all the various legends that would occur in a stock transaction. On that basis, your Honor, we feel that the federal jurisdicton is lacking here, and for reasons which will be covered by Mr. Piel, we feel that any discretionary pendent claims under state law which require proof of scienter is totally failing on this record.

THE COURT: Mr. Stitt, why don't you answer Mr. Maney at this point.

MR. STITT: Your Honor, I would just address myself to two points on jurisdiction, the '33 Act and the '34 Act.

First, the proof in this record abounds with important mailings and interstate telephone calls. I think the transaction starts onthe previous business day, which was Friday, March 13th, when in connection with a prior sale Goldman, Sachs mailed to Franklin a confirmation letter with the February 18th green sheet.

THE COURT: Tie yourself down to this transaction.

It is the only one before the court. There is no impact of telephone calls in this transaction.

MR. STITT: Continuing, if I may, your Honor, with-- I have it down in chronological sequence, on the afternoon of March 13th we had a conference call, interstate conference call, at which all Goldman, Sachs salesmen were told, one, Penn Central is in the top 10 list, and, two, it is the kind of paper that could be sold on a special order basis. Thus, the salesmen were encouraged to offer Penn Central paper for sale to customers who might call on the following business day, which was Monday, the 16th. The telephone call between Mr. Bock and Mr. Kaufman was, of course, interstate. But following that telephone call we have a whole host of interstate telephone calls--

THE COURT: Mr. Stitt, I don't know why I have to tell you, this is not impressive to me. Why do you insist on continuing the argument after I told you not to do it and after I told Mr. Maney it has no impact in this case.

MR. STITT: Your Honor, I will just focus on the confirmation letters. First of all, we have the confirmation letter from Goldman, Sachs to Franklin, which may or may not have contained an additional copy of the February 18th green sheet. Second, we have the confirmation letter from Penn Central to Morgan confirming their authority to execute, to fill in, execute and deliver the note. Next, we have the confirmation which was mailed by Franklin to the Savings Bank Trust Company confirming their authority to charge Franklin's account and to accept the note.

THE COURT: That's the first mailing, is it not? The rest were hand delivered.

MR. STITT: No, sir. The confirmation letter from Goldman, Sachs to Franklin was by mail. The confirmation letter from Penn Central in Philadelphia to Morgan in New York confirming their authority to fill in the note and counter sign it and deliver it --

THE COURT: That was a contract between Penn Central and the defendant Goldman, Sachs, and I agree with Judge Brieant's analysis on that. That has nothing to do with your purchase as principal. You bought from Goldman, Sachs. They were a principal. They were the seller, you were the purchaser. Forget Penn Central, forget Morgan, as far as where they bought it from.

MR. STITT: Then we have three mailings, your Honor. We have the Goldman, Sachs confirmation letter from Goldman, Sachs to Franklin confirming the purchase and indicating that a copy of the February 18th green sheet was enclosed. It may have been enclosed. If it wasn't enclosed it was because they had already mailed one to us on March 13th.

Second, we have the confirmation from Franklin to the Savings Bank Trust Company, our custodian, confirming their authority to charge Franklin's account with 4,870-odd thousand dollars in federal funds and to accept delivery of the note on behalf of Franklin.

Finally we have the confirmation letter mailed by the Savings Bank Trust Company to Franklin confirming that the note had been received. These were important mailings. Mr. Bock has testified to the importance that his bank and bank examiners attached to confirmation letters. The only documentary proof in Franklin's file that a note had actually been delivered was the confirmation letter from the Savings Bank Trust Company. We have also had proof and confirmed yesterday by Mr. Wilson that for banks, written financial information on the borrower, and this is the way banks treat commercial paper purchases, that such written information has significance beyond what is set forth in the documents themselves, and that this is the kind of information that bank examiners expect to find when they examine a bank's records. As a matter of fact, while your Honor has told me to stay away from Morgan and from Penn Central, you may recall in Exhibit BI, Mr. Lepley's diary or log, there was a notation I think under date of December 23rd or perhaps in January, but in connection with the $16,000,000 transaction, Morgan wanted a confirmation letter. So they are important within the financial--

THE COURT: They wanted a confirmation letter from their client. You did not buy from Penn Central. You bought from the defendant. How he got it is his business. It is none of your business.

MR. STITT: Your Honor, under Cashin and under Welch, the simple confirmation letter from Goldman, Sachs suffices for jurisdiction --

THE COURT: That's what Judge Brieant said in Welch, but I am not sure I am following him. You are trying to persuade me that I should, so don't quote him to me.

MR. STITT: I believe Judge Brieant was following the Second Circuit in the Cashin decision. It is our position that Cashin in the Second Circuit is the controlling decision here.

THE COURT: Go on to the next point.

MR. STITT: The next point, your Honor, is that the commercial paper note held by Franklin is a security within the 1934 Act, that Zeller and Welch mean what they say, and that in order to be excluded the note must satisfy each of four tests, all of them. Franklin's note meets none of these tests. First of all, we say that having been issued on the eve of bankruptcy, three months and five days prior thereto, the note quite obviously was not of prime quality.

THE COURT: I don't buy that. Go ahead to your second point.

MR. STITT: The second point is that having been issued as a substitute for long term financing, and in view of the pre-trial testimony of Mr. Van Cleave that we have designated and Lepley's testimony here in court, that Penn Central commercial paper was being rolled over and over and over. It was not issued to facilitate any well recognized type of current operational business requirements. That's the second test.

The third test, we say that this note was not eligible for discount with Federal Reserve Banks since it was not being issued to meet current operating expenses. I don't consider a roll-over to meet that test.

Finally, your Honor, we say that this is a type of note that was purchased by the general investing public, and we believe that the defendants' own computer printout confirms the wide range of investors acquiring the security in 1969 and 1970. So we say under the 1934 Act that there are these four tests, and we say that this note doesn't meet any of them, and, therefore, we are a security under the 1934 Act.

THE COURT: I don't need any reply, Mr. Maney. Mr. Piel?

MR. PIEL: If your Honor please, in the unlikely event that you are not persuaded by Mr.Maney's eloquence and learning, we come to the merits, or in the event that your Honor decides to defer a decision thereon until a review of the evidence, we come to the merits.

THE COURT: No, I won't decide this motion off the bench. I indicated some partial decisions off the bench, but not completely. Go ahead.

MR. PIEL: We have four claims that have been reviewed in the jurisdictional discussion. Your Honor, the plaintiff has fewer elements of liability to establish under his first claim than under any of the others. If he can recover at all he ought to be able to recover under the first. It is hard to conceive of a circumstance under which the court would say this state of facts does not prove a claim under 12(2) but it does prove one under 10B. I want to go further than to say we need only for practical purposes focus on a 12(2) claim. I'd like to propose to the court that the time has come now to dismiss the other three claims. Each one of them involves scienter. If your Honor does not agree with Judge Brieant and Mr. Maney that 17 does not afford a private right of action, at least, your Honor, to the extent that it is more than a mirror imagine of 12(2) and partakes of the function of 10B of the 1934 Act, it is subject to the same requirement as the 1934 Act cause of action of having to present scienter. I refer to discussion of that that we have at pages 92 and 93 of our main trial memorandum. I think your Honor will be satisfied by those authorities, that if there is a private right of action, and if it does anything more than 12(2) does, then like 10B of the 1934 Act, it requires proof of scienter.

In Cohen v. Franchard, in the Court of Appeals here, a verdict for defendant was upheld over an objection to Judge MacMahon's charge under 10B as follows:

"Guilty knowledge is the key to your decision in this case. The plaintiff must establish that the defendant whom you are considering had knowledge and intended to defraud these plaintiffs or that he acted in reckless disregard for the truth or that he knowingly used a device, scheme or artifice to defraud."

So far as the pendent cause of action under state law is concerned, Business law 352C, that statute is full of words of guilty knowledge in establishing criminal conduct forbidden by that section, and the cases to that effect are also in our trial brief. So I don't think your Honor needs to look into the wheelbarrow to decide those points. You have seen the men responsible for Goldman, Sachs' actions and decisions, you have been able to appraise them for truthfulness and sincerity and intention, and if there were anything more than your having heard the testimony of those witnesses that bore on scienter that's in the wheelbarrow, your Honor may be sure that Mr. Stitt would have confronted the witnesses with it when they were on the stand.

So I suggest, your Honor, that those motions be granted at this stage of the record in order that the discussion in the briefs that counsel will submit to you, citing to this record, can focus as it ought to focus on the 12(2) question instead of being diverted and diffused by going into peripheral claims and trivial suggestions of scienter in the fraud sense that Judge MacMahon included in his charge, approved by the Second Circuit. Focusing on the 12(2) act itself, liability here requires that there has been a prospectus or oral communication that included an untrue statement, or if there were statements made and they weren't untrue, then that there was an omission of a material fact necessary to make the statements made in the light of the circumstances under which they were made, is the statutory language, not misleading. Surely, here the circumstances include the normal expectations of sophisticated investors making up the buying side of this intent in high speed,short term mony market, including Mr. Bock. It is interesting that aside from the question of NCO rating as a requirement, the only other consideratum that Mr. Bock referred to in his testimony was that he should be able to lock up the highest available interest rate for as long as possible. As a tribute to his professional astuteness, your Honor will see the charts that we put in that traced the discount rate against the yield on Treasury bills and the discount rate against the cost of bank borrowings, and you will see that he was foreseeing something that in fact happened, and that was that soon after his purchase the current rates started dropping. So he had locked it up for as long as possible. And that was the situation.

There was an oral communication here. The oral communication was the answer to Mr. Bock's question, "What have you got that will pay 9 per cent and go out as far as possible?" Today we have issuers that are in the market that are willing to do that, and then names, including Penn Central. That's the oral communication. We agree that that oral communication implies a fact. We have conceded that as a legal proposition from the beginning of these horrendous cases that we have been in, and our witnesses have testified to it as a matter of fact in their own minds, and an investor is entitled to assume from the fact that they are offering it, without saying anything about it, that Goldman, Sachs has a good faith opinion that it is creditworthy, that the notes will be paid at their maturity, and that there is some reasonable basis for their opinion. That is the communication. In fact, that is the only communication. I won't go into the cases on this point, they are in our brief, but I submit to your Honor that it is clear that if you want to adduce an omitted fact, you have to show that there was a statement that needed the fact to be added to be a fair statement.

Mr. Bock in perfectly straightforward, simple terms agreed, so it was unnecessary to put any Goldman, Sachs salesman on the stand, that nobody from Goldman, Sachs ever said a word to him about Penn Central, except that they had its note to offer in a maturity and at a rate that he was asking for. That is all they said to him.

THE COURT: With the implication --

MR. PIEL: Except for the implication, which I will come to. I want to make it clear that it is really down to this, to the implication. There was no written communication which could be claimed to contain a misstatement or to require an additional statement not to be misleading.

The only thing we have that Mr. Stitt hangs his hat on is the February 18, 1970, green sheet, that report of the year end results, a preliminary advice of the year end results before they would be able to get the white sheets out based on the annual report. It is assumed or guessed or speculated that perhaps that was included with the confirmation of the Friday, March 13th purchase. Of course, if it was included with the confirmation of the March 16th purchase, it was after the fact and after the event and could be no part of an inducement, even if read by Mr. Bock.

Mr. Bock agreed that it was unlikely that the confirmation, the state of the mails in the City of New York, you can get a letter in this town quicker from California than you can from another part of the city. We all know that, and he was reasonable about it, and he said he had no idea that he had had that before he made his telephone order.

THE COURT: He said he didn't remember ever seeing it.

MR. PIEL: He doesn't remember ever seeing it. He agreed it might have arrived any time that week, and furthermore he expressly said in his testimony that before ordering the note from Mr. Kaufman over the telephone early in the mid-morning of March 16th, he had not read, checked or looked up anything. So that would go for the mail, if it were there, as well as the Moody's and the other things that he had in his office, he could perfectly well look at it, if he wanted to. But he said that he was relying on Goldman, Sachs and perhaps -- I don't impute anything insincere about Mr. Bock, but in his natural enthusiasm for this cause that he has here, he may well have complimented us more highly than he would have off the stand for being people that he trusted.

THE COURT: He was testifying to how he felt on March 16th, not how he feels on June12, 1975.

MR. PIEL: I am just saying that his testimony on June 12th about his feelings on March 16th many years ago may be improved, and I don't object to that, because we concede that he had a right to rely on us, and if he says he did, we will assume he did. On what? On the implied representation that Goldman, Sachs had a good faith opinion that these notes would be paid off at their maturity. If there is real evidence of a lack of good faith, I am sure Mr. Stitt will advance it as best he can. I think that it doesn't rise higher than trivial innuendo that's unbelievable. His line of proof that he calls conflict of interest, desire to curry the favor of Penn Central, desire to build business, it is just too unreasonable on the total picture to infer that over the sworn denials of those witnesses, when they had much more to lose than to gain by selling bad meat. So it really comes down to a question, if there is any question, of reasonable basis. Of course, here I am concerned about your Honor's quite understandable expression of astonishment that in the face of the publicly known news of the 1969 year end results, Mr. Bock, knowing that, would buy the note, let alone Goldman, Sachs being willing to continue to offer selling the note.

Vogel and Wilson testified that a reasonable basis for a judgment of credit worthiness is to identify sufficient unencumbered assets which are salable for cash or by timely action, may be used to support additional financing. A bad earnings record is irrelevant to that, and Mr. Bock so testified. When in explaining how the 1969 year end results did not deter him, although he knew them, he referred to the non-railroad crown jewels of this empire. He mentioned some of them by name. He was familiar with them. He said that as a result of knowing that those things were there, he assumed that Goldman, Sachs was making a balancing judgment of good news against bad news, he assumed they talked to the management, he assumed they were not telling him everything that management told them, but that they were using what they knew and what they found out to make a balanced judgment, and he was relying on that. Let me just say before I go on on the subject of the basis that the fact that this road went into reorganization after the disastrous May bond market and after the Department of Transportation was stopped from doing what it had been its intention to do, of guaranteeing lines to bridge over again to a decent market situation where long term financing could be gotten, if that is going to be considered as part of the evidence or as a basis -- as for example, Judge Brieant did in judging that it isn't even commercial paper-- this does something that goes beyond the expectations, the normal or reasonable expectations of people in the marketplace. The kind of a judgment that Mr. Bock was entitled to was a good faith judgment on some reasonable basis for assuming such a judgment. He wasn't entitled to a perfect judgment, he wasn't entitled to a judgment that would be so good that nothing could go wrong. If so, commercial paper wouldn't command so much higher rates than Treasury bills, and, furthermore, that would be a promissory representation rather than the misstatement of a fact. It would be a promissory guarantee, which is not implied in the securities laws, or ever within the reasonable expectations of the parties. The promissory obligation here was that of Penn Central, not of Goldman, Sachs. As to the basis, Mr. Vogel explained the standard commonly relied upon methods of evaluation by reference to available market values in manuals that the financial community relies on to make these judgments and on certain earnings multiples. Mr. Maney presented and introduced the documentary evidence as well which establishes without any contradiction in this record every proposition set forth in our proposed findings numbered 95 to 124 regarding elements of value to support the judgment. I think Mr. Stitt's response to this is very significant. He didn't touch it. He did not bring any witness here, any financial person, who is expert in analyzing values and methods of valuing to give expert testimony that what Mr. Vogel, who spent his life with this, was the manager of the domestic credit of the Grace Bank, went to Goldman, Sachs when Grace merged with Marine Midland-- to testify that it was the way to do it. If it isn't the way to do it, on that testimony, Mr. Stitt owed us a witness to dispute the standards or to dispute the way the standards were applied to these facts of public record. He did not do so. He didn't even touch the question in his cross-examination. If I may say to your Honor were friendship and affection for Mr. Stitt, his cross-examination of Mr. Vogel made me think of the college student who was coming up to his comprehensive exams. One of his courses had been

Bible history. He was nervous enough about this comprehensive exam that would have one question from each course, but he was panicked about Bible history because he had not opened the book. But a wise friend of his who had analyzed previous exams said "That's easy to figure out what they will ask you this year. It is time for them to ask the names of kings of Israel." So he committed them to memory. When he got into the examination room, the question "Name the major and the minor phophets."

He thought about that for a moment and he wrote down "Far be it for me to draw invidious distinctions among the holy men of old, but the kings of Israel were." Mr. Vogel testified about unencumbered assets. Mr. Stitt cross-examined him about encumbered assets. Your Honor hasn't had an opportunity to analyze and absorb that evidence, and we hope our brief will be of assistance in shortcutting the labors of doing so. I must say, the court's astonishment that Mr. Bock would buy and that Goldman, Sachs would sell does, of course, concern us, and I must say it is astonishing. Perhaps even more astonishing is that Mr. Bock would buy than that Goldman, Sachs would sell, because Goldman, Sachs was concerned and alarmed and put on its toes by the release of the year end statements enough at least to get an explanation and to get assurances from these top flight men who came right up to New York, and on the 5th, the day it appeared in the newspapers, they were with their steely eyed commercial bankers explaining and getting the commercial bankers to accept the company as in a good credit position at that point, despite these deplorable earnings, and the next day they were at Goldman, Sachs giving the same explanation. It is very interesting to compare the memoranda by the bankers of what Bevan and O'Herron told them, and heaven knows they are expert in cross-examining issuers who want more money and in getting the facts they need, and the memoranda of February 5th and 6th that reported what Wilson on the 5th and Wilson and Levy on the 6th got from these gentlemen in the way of information. You would think the same person had been the reporter for both and that he didn't bother distinguishing between the meetings. So Goldman, Sachs at least satisfied itself that it was in a sound position, and these commercial bankers, as the record shows, satisfied themselves then and later and later, right up into April, that it made sense to lend money to the Penn Central; and they all have claims in the reorganization. I said that I only wanted to make a couple of remarks for the purpose of a point of view or a perspective, and I have been trying to think of how to epitomize what I think is the problem of hindsight in this case. If one goes down a country road observing the scene as you go along, you come to a house and you see what it looks like and you go along and you pass some fields and there is a barn and you go along and there is a clock tower, and you see all these different things along the road and they make a certain impression on you and give you a certain picture, and then you get down the road a couple of years and you turn and look back and it is entirely different, the scene is merged, the house seems to be part of the barn and the clock tower is coming out of the house and some of the other details that were there that you relied on for your impression are there no longer, the scene has a tendency and a compactness that it didn't present to you as you walked on through it, it has a different significance from this view. Your Honor coming over the road of time from the other direction comes here and just sees that. The effort has to be to get back into the scene the way it was. I think even meeting at this point in the road someone who has just been up the road and asking him to turn around and look at it, he still can't quite see it, the significance of the compact, dense overlay of events that have been foreshortened by the perspective into one conclusion, because he still has in his mind the scene that he walked through. He is more flabbergasted and puzzled than he is understanding as a result of this change in focus. In order to judge the reasonableness and good faith of those who were doing the judging in 1969 and 1970, we have to get back into the way it was, and I will just stop by saying how it began, and then we will try to handle the rest of it in our brief for your Honor. I might say it began with the second trip of the merger to the Supreme Court. In Penn Central merger and N & W inclusion cases decided January 15, 1968, 389 U.S. 486, the Supreme Court said at 493 in the opinion by Mr. Justice Fortas, "The Pennsylvania and the New York Central dominate rail transportation in the northeast. Their freight operations extend over some 20,000 miles."

Incidentally, your Honor, this seems to me to be a passage in which the Supreme Court is taking judicial notice of accepted commonly known facts, because they don't say "It is contended" or "It appears from the record." They are just telling us what it is. "Their freight operations extend over 20,000 miles of road in 14 states and Canada. They are the two largest passenger carrying railroads in the United States."

Then skipping more about them, "The proposed merger which the ICC has approved contemplates the unification of these vast roads, and as time goes on the rationalization and elimination of some of the dual facilities and services in various areas and in various respects. The merger will result in enormous savings in transit time."

Those words are in quotes, enormous savings in transit time. Then the court goes on, "It is estimated that in eight years the savings and expense will amount to more than $80,000,000 annually."

It is going to take eight years to get there, your Honor, with congressional committees and the Interstate Commerce Commission and the public press gazing at it and the Supreme Court looking at it twice, it had to be seen by everybody as something that was going to survive for eight years to do that, and in the meantime it was called in the evidence and called by the witnesses a unique credit. There never was anything like it in terms of a financing proposition in the United States. It had the crown jewels to keep the show on the record for eight years in everyone's estimation. So when it comes to being overcome by the surprise and cataclysmic rush of events, I think getting back into that atmosphere at the time is just and fair and will result in a conclusion that we cannot say there was not a reasonable basis for what was obviously a good faith opinion. I think, your Honor, that on the balance of the evidence, plaintiff has fallen short in making its case. I'd just like to say that this belief that is echoed in the Supreme Court's decision about not merely the credit worthiness for short term financing purposes, but the long run viability of this enterprise, that belief was so strong and so big that it was thought proper and feasible and not a defeating handicap to saddle the Penn Central after it had been put together in early 1968, one year later they gave it the New York, New Haven & Hartford with all of its headaches and financial woes and losses.

THE COURT: That was to sweeten the pie.

MR. PIEL: Sweeten the pie with some bitter aloe. The acquisition or merger was effective January 1, 1969. In the year 1968 under its own independent management and ownership or over direction of the Bankruptcy Court, the New Haven was in bankruptcy here in this court, in 1968 the New Haven had a net operating loss -- net loss, net income loss, of $22,000,000. So starting January 1st, whatever it had to contribute in the way of losses was added to the losses of the Penn Central. When the news came out about the year end earnings, one little adjustment to keep in mind is that the Penn Central management's performance shouldn't be judged by comparing the year end results for 1969 with the year end results of Penn Central for 1968 because, as it says in a footnote to the financials and in a footnote to the press release that was released on February 4th or 5th, 1970, the results for the New Haven are not included in Penn Central's figures for 1968 but they are included for 1969 and they are not broken out. Your Honor, just going back for a moment to the Supreme Court's opinion, I just want to point out, they were talking about an eight-year period to rationalize, to effect economies and to get into being a successful railroading enterprise. They were only a quarter of the way along that road when this disastrous event happened, and one Sunday they filed in Philadelphia for reorganization. Thank you.

THE COURT: Mr. Stitt?

MR. STITT: Your Honor, before I started, I seemed to have left the exhibits in the jury room, I would draw attention to the fact that the February 18th green sheet was received in the mail by Franklin, it was read by Mr. Bock, you could remember his identifying the interdelineations in his own handwriting--

THE COURT: He doesn't know when he read it.

MR. STITT: That is true, that is true.

THE COURT: That's the point.

MR. STITT: I thought the point was that he had never read it. I apologize for having misunderstood. Your Honor, the security in this case, commercial paper, is generally regarded as low risk security. In a brocure which Goldman, Sachs sent to Franklin to solicit its business, Goldman, Sachs compared commercial paper in terms of soundness and safety to securities of the United States Government. That's Exhibit 32--

THE COURT: Whoever would believe that? It is not a representation to Bock. Bock is an experienced man. Let's have your argument against a man who is an experienced man. He is no babe in the woods like me.

MR. STITT: He is, indeed, but I want to emphasize--

THE COURT: He is indeed a babe in the woods?

MR. STITT: No, sir. I said he is indeed not a babe in the woods. Because of the short term nature of commercial paper and the fact that the holder is an unsecured creditor, that the issuer's liquidity and its bank lines are matters of paramount significance to the purchaser. That is, cash must be available to pay that note at maturity. It can't be done with real estate, it can't be done with rolling stock, it can't be done with rights of way, it can't be done with Madison Square Garden. Mr. Bevan in his deposition, which the defendants have designated, has some interesting testimony on that matter at pages 116 to 122. New York savings banks were first authorized to buy commercial paper in 1968, and they were only authorized to buy paper having the highest rating of an independent rating service designated by the State Banking Board. Those are the only kinds that were authorized for purchase. As of March 16, 1970, the only designated agency was NCO or the National Credit Office. The paper which Franklin purchased was acquired from Goldman, Sachs & Company, the oldest and largest dealer, a firm of high reputation, which held itself out as being knowledgeable in all aspects of commercial paper, including the investigation and monitoring of issuing companies and their affairs. The paper was sold to us three months and five days before Penn Central filed its reorganization petition.

The Franklin Savings Bank did not expect fraud merchandise from a house like Goldman, Sachs, but this is just what we got, and we ask that they take it back and return our money in our cause of action for rescission.

THE COURT: I thought I made clear that I will not make a finding that because Penn Central went into reorganization on June 21st that it follows that the paper on March 16th is not prime.

MR. STITT: I would not quarrel with that approach, your Honor, but I am trying to put this case in a framework.

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THE COURT: The framework has to omit what happened on June 26th. That's hindsight.

MR. STITT: But it is a fact in the case.

THE COURT: I have told you now four times, it is not a factor in the case, and I disagree with Judge Brieant with respect to the fact that he made it a factor. I tried to interpret what he said to perhaps mean that it was not the factor that you seek to make it mean.

MR. STITT: We say that we are entitled to relief because Goldman, Sachs did not disclose material information to us when Goldman, Sachs sold us this paper. They talk of credit worthiness, reasonableness, we think these are sham issues. The test in this case is whether the undisclosed information might have been considered important by a reasonable investor in deciding whether to buy the paper. There are two categories of omissions on which we rely.

First, information which Goldman, Sachs had in its own files and which Goldman, Sachs concededly knew. The second category is information which Goldman, Sachs, we say, could have known in exercise of reasonable care. That is an issue on which Goldman, Sachs has the burden of proof under Section 12(2). In my presentation this morning of the first category, I have grouped the omissions which we say any one of which would suffice on liability under three headings --

THE COURT: I hope you are not repeating your brief for me.

MR. STITT: No, sir. Liquidity, bank lines and inventory. Let's first take up liquidity. In early February Penn Central Transportation told Goldman, Sachs that its cash position for the first six months of 1970, and that's the inclusive period of Franklin's note, that its cash position during that period was very tight. Penn Central also told Goldman, Sachs that it was budgeting continued losses for 1970 of $56,000,000, and they told Goldman, Sachs they had additional cash needs of $170,000,000. This very tight cash position as of March 16th had been further aggravated by other factors, namely, 1, the removal from its approved list of purchasers by Brown Brothers Harriman, a firm which had previously purchased up to 15 per cent of Penn Central's outstandings--

THE COURT: I told you that I would not consider that as a factor.

MR. STITT: The point I am making, your Honor--

THE COURT: Why didn't you bring Brown Brothers here to tell me why they did it?

MR. STITT: The consideration I am stressing here is that this deprived Penn Central of a potential source of cash of $30,000,000. Similarly, the diminution of sales of commercial paper from the Goldman, Sachs inventory, which in the past had held as much as 15 to 20 million dollars of Penn Central commercial paper during December-January. That also eliminated an important source of cash or a potential source.

THE COURT: But there was no trouble in selling their paper during that period, was there? They didn't need it.

MR. STITT: That was what Mr. Levy testified, they didn't need it.

THE COURT: You haven't indicated anything to the contrary. There is nothing in the record that indicates anything to the contrary.

MR. STITT: But there did come a time, your Honor, when they did have difficulty selling this paper, and the Goldman, Sachs inventory and the substantial block that Brown Brothers had bought, those two sources were no longer available, and we say that this did aggravate this existing and projected very tight cash position. We believe that could have been foreseen. These factors would all be significant to a prudent investor. They all adversely affected the issuer's ability to have cash to meet these maturities.

Above and beyond that, above and beyond these factors that I have just mentioned on liquidity, we have this habitual roll-over situation. Exhibit BI has roll-over, roll-over, roll-over, page after page after page. In theory, commercial paper is a self-liquidating investment. The philosophy is that the proceeds from the sale of the commercial paper purchases goods and services which generate cash in the current position which is thus available to liquidate the note. We didn't have this in this situation. We had this roll-over. The next heading I have is bank lines.

THE COURT: Are you telling me that they should have told Bock that a lot of the $200,000,000 was roll-over paper?

MR. STITT: Yes, sir. I believe that is a very material consideration. It would have shown Mr. Bock that this paper was not being used for current purposes.

THE COURT: Do you mean to say Mr. Bock didn't know that commercial paper gets rolled over?

MR. STITT: He did not know that this paper was being rolled over. It is not supposed to be rolled over. If he had been told that fact, he wouldn't have bought it, because he would have known that it wasn't being used for current operating purposes. I think his testimony on that is quite clear.

THE COURT: He didn't get roll-over paper, did he?

MR. STITT: He got what is called special order paper. But I think the testimony is clear, beginning with Mr. Van Cleave's examination before trial, that beginning maybe as early as when Mr. Lepley came on board that Goldman, Sachs sales are always designated and focused on the maturities that were coming in on that particular day, and the sales were to meet the incoming maturities, and that was this roll-over.

THE COURT: But when you had the ICC order allowing them to have $200,000,000 outstanding for a period of two years, there had to be roll-over. You couldn't miss it.

MR. STITT: No, I can't accept that, your Honor. But I will say that regardless--

THE COURT: There had to be. If you have a 270-day limit and the ICC said you can have 200,000,000 outstanding for a two-year period, there has to be a roll-over.

MR. STITT: Yes, butthere are seasonal ebbs and flows, I believe that was also the subject of testimony.

THE COURT: So Mr. Bock must have known that there were roll-overs here, there had to be under the ICC authorization.

MR. STITT: No, sir, he did not have to know that.

THE COURT: Of course he did. He is a smart man, a securities analyst, he reads the Times every day and the Wall Street journal every day.

MR. STITT: He specifically testified that he never rolled over Penn Central paper.

THE COURT: What does that have to do with it, whether he rolled it over. He must have known it was rolled over -- that Penn Central was rolling over, maybe not the piece he bought, but he had to know it was being rolled over.

MR. STITT: Mr. Bock testified that if he had been told that this paper--

THE COURT: I am telling you that Mr. Bock had to know it was rolled over paper, Mr. Stitt. Go ahead. I don't mean the paper that he bought, but that Penn Central was rolling over. Otherwise tho ICC authorization was meaningless. They didn't need it.

MR. STITT: Perhaps, your Honor, I should go on with bank lines. I think we have just reached an impasse here. Notwithstanding repeated requests in the fall of 1969, Penn Central's bank line coverage never exceeded 50 per cent after November, 1969. Bank lines are important to investors because they provide an alternate source of cash to pay off tho note if the company itself lacks the cash. Goldman, Sachs repeated requests confirms the materiality of these omissions, and particularly I refer the court to the testimony of Mr. Levy, I believe at page 65 of his testimony before the Securities and Exchange Commission, that in this case Goldman, Sachs feared a run-off and that he wanted Penn Central -- excuse me. Not only before the SEC, but also in this case, you have to combine the two, I believe, that Goldman, Sachs feared a run-off and wanted Penn Central to increase its coverage for the investors' protection. He used that phrase, "investors' protection," in his testimony before the SEC, and I have quoted it in my pre-trial proposed findings. The materiality is also confirmed by the fact that a number of commercial paper investors, Mr. Wilson testified about this, a number of them will not buy an issuer's paper unless the paper is secured or supported by 100 per cent bank line coverage. We come now to the inventory actions of Goldman, Sachs. In considering these omissions, I would stress the timing and the context of the decisions that were made and the actions taken.

Promptly after, one, an announcement of the 1969 losses, which came as a complete surprise to Franklin, two, the concern expressed by the National Credit Office, three, the removal from its approved list by Brown Brothers, and, four, the statement by management of Penn Central that

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they could not get additional bank lines, Goldman, Sachs requested and got a commitment from Penn Central to buy back $10,000,000, two-thirds of its inventory. At the same time Goldman, Sachs put a ceiling of $5,000,000 on the amount of paper which they would carry at any given time, and they put Penn Central on notice, and those words "on notice" appear on page 2 of Mr. Wilson's blue sheet of February 5th as Exhibit F2, put them on notice that in the future they would set up procedures whereby this paper would be sold on a tap issue basis whereby Goldman, Sachs would not inventory any Penn Central paper. Goldman, Sachs took these steps for the following reasons, we say. One, Penn Central's very tight cash position. Second, Penn Central's continuing and projected losses. Third, Penn Central's inability to increase its bank line coverage from 50 per cent to 100 per cent. Four, as Mr. Levy testified, Goldman, Sachs feared a run-off. Goldman, Sachs' actions with respect to their inventory showed the materiality of the non-public information which Goldman, Sachs had on Penn Central, the existing or projected tight cash position and its inability to increase bank line coverage from 50 to 100 per cent. Moreover, the timing and the context of Goldman, Sachs' actions regarding its inventory clearly show the real reasons for their actions. I think perhaps one of the most significant statements in the entire case is this one by Mr. Wilson in the portion of the March 23rd green sheet, Exhibit F5, in his conversation with O'Herron:

"I told him that that was not my understanding and that in fact Goldman, Sachs & Co. felt that a $5,000,000 ceiling was appropriate until such time as they obtained 100 per cent line coverage, completed some of these long term financings and started to reduce the operating losses." Proof of materiality, we say, from Goldman, Sachs on blue sheets. During the trial we had a lot of mention about things like negative loss carry or was it negative carry loss. Your Honor will examine the blue sheets F2, F3, F4 and F5, and your Honor will find no mention of negative loss carry in any one of those documents. Yet, even assuming that there are other factors, as the defendants contend and as we deny, that such things as negative loss carry might have been involved in their decisions and their actions, we say that the inside knowledge, this inside knowledge about projected losses, bank lines, tight cash position, must be considered in the key element in this decision. Most respectfully, I would draw the court's attention to a decision I believe of Judge MacMahon in the case of the Securities and Exchange Commission v. Shapiro, 349 Fed. Supplement 46, affirmed by the Second Circuit at 494 Fed.

2nd, page 1310. This bailout, if I may use that term, is, I suggest, bedrock proof of the materiality of Penn Central's lack of liquidity and its lack of full bank lien coverage. Moreover, we say that the bailout itself is a material fact which a prudent investor would have considered important from the sheer mathematics of the situation. On February 4th Goldman, Sachs held $16,000,000 of this security in their inventory. It was theirs, they were selling its paper as principal. By March 16th they were down to $5,000,000. By April 8th, zero. It was zero all the way thereafter. In a word, we say that Goldman, Sachs was getting off a sinking ship while they were beckoning Franklin to come on board.

THE COURT: What do you mean, beckoning Franklin to come on board?

MR. STITT: Discussing offering this paper for sale for us on March 16, 1970. It has been conceded, I believe, and if I have not understood my adversary I do apologize, but I believe it is conceded that Goldman, Sachs by offering paper, by saying "These are the names we have," is recommending these names for purchase. I would like now, if I might, just to focus on two omissions of the second category, and that is material information which we say Goldman, Sachs could have learned in the exercise of reasonable care prior to March 16, 1970. First, that Penn Central Transportation was projecting losses of $46,000,000-plus for the first auarter of 1970. This would be three times the fourth quarter 1969 loss of $16,000,000 and four times the loss for the first quarter of 1969. It could be inferred from Mr. Bevans' deposition, and I refer the court to pages 58 and 59, and offer proof, that Goldman, Sachs was given this information on February 6th. You are going to have to read the testimony very carefully. But, in any event, the 1970 plan as updated by the Underhill projections, Exhibits 76, 77 and 78, show these projected losses as early as February 6th and as late as March 6th. By February 5th Goldman, Sachs had been receiving, which we say singularly and cumulatively made it incumbent upon them to verify the railroad's financial muscle and its earnings projections. These warnings came from a variety of sources. They came from Continental Insurance, Mr. Cox, the ICC, NCO and Brown Brothers. We say that the defendant's position that Penn Central would have refused these first quarter projections if Mr. Wilson had asked for them is simply not the case. First, no information was ever refused Goldman, Sachs by Penn Central in the past. The record is clear on that. Second, as witnessed by the prompt gathering at the Recess Club on February 6th, Goldman, Sachs had the clout to compel the prompt attention of the top financial officers of the railroad: Bevan, O'Herron and Loder. Third, Goldman, Sachs partners, or at least three, Mr. Levy, Mr. Blaine and Mr. Fowler, had close, long standing business and personal relationships with Mr. Saunders and Mr. Gorman, as well as Mr. Bevan and Mr. O'Herron. These were four of the distributees of the Underhill projections. The 1970 plan was discussed by Goldman, Sachs at its meeting on February 6th, and I would call attention to testimony that I have designated of Mr. Levy, pages 66 to 67 of the examination before trial, that he had advance word on the actual 1970 first quarter, or losses after March 16th but before they were reported in April. Beyond that, your Honor, they had the ultimate weapon. They were under no legal obligation to continue selling this paper. They could have refused and discontinued sales. As a matter of fact, your Honor will see from Exhibit F14 that they took a similar position with regard to the Strick Company back in January or thereabouts of 1969, where they said until they had the information they wanted they wouldn't be in a position to issue the paper of that company.

Finally, this was indeed a workout situation where, as Mr. Sullivan of Manufacturers Hanover testified, such information is made available by a corporation to one's bankers. Second, we say that they could have learned, as Peat, Marwick had found no later than March 12th, Exhibit 80, that all or rather substantially all of the assets of Penn Central Transportation and the consolidated companies and their balance sheet had been pledged, encumbered or otherwise restricted. As a matter of fact, Mr. Vogel testified that by the end of 1969, he knew that a substantial portion of Penn Central assets were pledged and encumbered, and he later admitted that in April he had learned what Peat, Marwick had already found, namely that substantially all of these assets were pledge or encumbered. Mr. Wilson testified in Welch and in this case as to what he might have been able to do to check up on these statements made to him at the February 6th meeting, and he said that he could have contacted the accountants, Peat, Marwick, Mitchell, but he didn't think it was necessary. We say that having learned on February 4th that the railroad's projections, or at least Mr. O'Herron's statement to him as to what was going to happen in the fourth quarter, he had learned that these projections and opinions could not be accepted at face value, and we say that he was under an obligation to verify what he was being told. Again, I would remind the court that Goldman, Sachs had the corporate contacts and the ultimate weapon to compel assistance. There is no testimony and no reason to believe that Peat, Marwick would not have cooperated.

Finally, we say that Goldman, Sachs misrepresented to Franklin or by their course of dealing that they had and were conducting a thorough, complete and on-going investigation of Penn Central and its affairs and its prospects. At a conference before the court last October, the defendants took the position that Franklin was relying on Goldman, Sachs to do a good job. Focusing on that contention, I would say --

THE COURT: That was not a conference before me that I am aware of.

MR. STITT: That is true. That is why I put in the date. They did not do a good job on Penn Central. They did an abominable job. If the court would just consider the following examples, at meeting called in September to discuss the merger, the cash flow and long term financing, Goldman, Sachs was told that Penn Central's cash position for the first quarter of 1970 would be very tight and Goldman, Sachs' request to put us out as much as possible paper maturing in April or beyond, and Penn Central also requested Goldman, Sachs' cooperation in getting ICC approval for an additional $50,000,000 of commercial paper to increase the level of outstandings from 150,000,000 to $200,000,000. They did. Yet they made no inquiry as to cash flow, there was no call for specifics, no request for projections. They did not insist on the railroad's getting additional bank line coverage to match the increase in outstanding. In approving this issuance in November, 1969, and if it didn't have significance then, your Honor, we say it had to have glaring significance on February 5th, but at that time the ICC noted its concern over Penn Central's use of commercial paper as a substitute for long term financing and pointed out that this could expose the railroad to a serious economic squeeze.

THE COURT: What does that mean in this case, Mr. Stitt?

MR. STITT: It means, your Honor, that this was a signal, a warning--

THE COURT: A signal that Goldman, Sachs shouldn't sell it and nobody should sell commercial paper which the ICC was authorozing?

MR. STITT: It was a signal to Goldman, Sachs, I think, to dig deeper, but I am saying that even --

THE COURT: Why didn't the ICC do it and why did the ICC say it was a strong financial institution?

MR. STITT: I don't know, your Honor.

THE COURT: You don't know? If you don't know that, the other thing is meaningless to me.

MR. STITT: I do say that by February 5th when we couple with this warning which the ICC felt--

THE COURT: I told you, I ignore that as a warning because the next paragraph says "strong financial institution."

MR. STITT: Again, your Honor and I are at an impasse.

THE COURT: I am telling you what I am finding in this case on that particular item of proof.

MR. STITT: I am saying when February 5th came--

THE COURT: That is something else. Get off the ICC. It doesn't help you one iota. In fact, it hurts you.

MR. STITT: Dropping the ICC, your Honor, and I will just continue, by the end of 1969, as Mr. Vogel testified, they knew that a substantial portion of Penn Central's assets had been pledged or encumbered, losses were continuing, they knew that cash was very tight, at least that's what they had been told by Mr. O'Herron. Yet, they continued to sell this paper without insisting on 100 per cent coverage, and no one was forcing them to do so.

THE COURT: All right, you are getting repetitious. You said that to me twice. Decision reserved on all motions. What are we going to do on any briefs?

MR. PIEL: Your Honor, the crash program has created problems, not only for us in having these Penn Central cases come up all over the courthouse, but also for the court reporters to get transcripts out, and we are informed that on that account we really cannot expect to see a transcript before the end of July. My suggestion would be, if your Honor approves, is that we make the delivery of the transcript to your Honor and to counsel the starting point for counting days for briefs to be submitted. We could be at work ahead of time from our recollection and our notes on trying to construct briefs, but we will need to work with the record to get it decently coordinated and cross referenced to documents and testimony. I would suggest that in order to narrow the focus of the case that Mr. Stitt lead off with a brief 30 days after receiving the transcript and we have answering brief 30 days after that.

THE COURT: Mr. Stitt?

MR. STITT: Your Honor, I too was informed by the court reporter of the delay in receiving transcript, and certainly in other cases I have had the schedule for briefs set in accordance with the delivery of the transcript. I am afraid the schedule proposed by Mr. Piel might unduly prolong the post-trial process. My suggestion would be that within so many days, perhaps 30 days, as Mr. Piel has suggested, after the delivery of the transcript, we exchange briefs and then perhaps within 10 days to two weeks thereafter we submit any replies that we might consider.

THE COURT: I will do it that way.

MR. PIEL: May I be heard on that?

THE COURT: Yes.

MR. PIEL: It seems to me that it is quite apparent these briefs are going to pass in the fog. Mr. Stitt today by sauing that our submission about good faith and reasonable basis was rubbish, a false issue, it is not in the case. He is claiming a general duty of disclosure. Then he gets around to the end, and he says a sellout on inventory is a badge of bad faith. I think we need to focus on what it is that he claims before we try to meet it. It is totally unfocused.

THE COURT: You are more aware of the testimony in this case than I will ever be. You have lived with the case for years, you know the depositions by heart, you knew every word that was going to come out from a witness on the stand except in maybe a few instances--

MR. PIEL: Fourth round of testifying.

THE COURT: It took seven or eight days to put it in. I think you know what he is talking about and you knew what you are going to be talking about. The transcript won't be ready until the end of July. Exchange of briefs within 30 days thereafter and replies two weeks thereafter. Even this schedule brings us into September, it seems to me.

MR. STITT: Does your Honor wish us to prepare proposed findings and conclusions as part of our brief or a supplement to them?

THE COURT: You were asked to submit them before the trial started.

MR. STITT: Which I did, with citations.

THE COURT: That is enough. As I say, you know this case without trying it. I don't. You must have known what was coming out and what you wanted. You don't need any more in that regard.

MR. PIEL: I think we would like, if your Honor will permit, to review the proposed findings submitted before trial. I was glancing at it last night. I think we have some propositions in there that we won't claim were proved because we omitted the proof.

THE COURT: If you want to submit amended ones, you can.

MR. PIEL: I think we would like to do it.

THE COURT: I don't make proposed findings. I don't write out and end up with the sentences required by rule so and so. Proposed findings I like in advance of trial because it tells me where you are going, I have some idea of what is coming in.

MR. PIEL: The annotations in the brief would be just as useful to your Honor, then, as revised findings.

THE COURT: Absolutely. If you want to case them out specifically, I'd like to know.

MR. STITT: Do we have discretion with regard to findings? I have sort of gotten in such a habit--

THE COURT: If you want to. But I am not promising I am going to read them.

MR. STITT: I do thank the court.

THE COURT: Good trial. I enjoyed it. Hope to see you again soon.

(Case closed.)

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Name	Direct	Cross	Redirect	Recross
Thomas P. Asay	55			
Harry H. Bock	87	171	307	318
George Moten Van Cleave	336	467	545	
George E. Doty	551	589	600	
Jack A. Vogel	618	714		
Gustave L. Levy	769	813		
John J. Sullivan	838	884	897	902
Raymond C. Lepley	914	964	1015	1044
Robert Gordon Wilson	1047	1128	1215	1218

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CX		404
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Defendant	Identification	In Evidence
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CW		442
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FA		940
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